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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 330

OPP COTTON MILLS, INC., ET AL., PETITIONERS

v.

ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court below (R. 356–365) is reported in 111 F. (2d) 23. The findings, opinion, and order of the Administrator are found at R. 259–348.

JURISDICTION

The judgment below was entered April 2, 1940, and petition for rehearing was denied May 16, 1940 (R. 366, 380). The petition for certiorari was filed August 13, 1940, and granted October 14, 1940. The jurisdiction of this Court is based upon Sec-

tion 10 of the Fair Labor Standards Act of 1938 and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act is constitutional; petitioners base their objections on (a) the commerce clause, (b) the Tenth Amendment, (c) the due process clause, and (d) the principle forbidding undue delegation of legislative power.

2. Whether the proceedings of the Industry Committee and the Administrator were proper, under the statute and the Constitution.

3. Whether there is substantial evidence to support the findings of the Administrator (a) that the minimum wage established would not substantially curtail employment and (b) that a classification within the industry was not required.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Sections 5, 6, and 8 of the Fair Labor Standards Act of 1938, 52 Stat. 1060 (29 U. S. C. Supp. V, Secs. 201 *et seq.*). These sections are set forth in Appendix A, *infra*, p. 112. The text of the entire Act is set out in Appendix A of the brief for the United States in *United States* v. *Darby Lumber Co.*, No. 82, this Term, pp. 119–144. For the convenience of the Court the provisions pertinent here are briefly summarized:

Section 6 provides that every employer shall pay to each of his employees who is engaged in interstate commerce, or in the production of goods for that commerce, not less than 25 cents per hour during the first year from the effective date of the Act (October 24, 1938), and 30 cents per hour during the next six years, unless changed for a particular industry by the administrative procedure hereinafter described.[1]

Section 5 of the Act directs the Administrator to appoint industry committees to be composed equally of representatives of the public, employees in the industry and employers in the industry (Sec. 5 (b)); "due regard" is to be given in the appointments to the geographical regions in which the industry is carried on. The industry committee is to investigate conditions in the industry and to recommend to the Administrator "the highest minimum wage rates for the industry [not in excess of 40 cents][2] which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry" (Section 8 (b)). The committee is to recommend such reasonable classifications within the industry as it determines are necessary for the

[1] After the expiration of seven years from the effective date of the Act, the minimum wage rate will become 40 cents an hour unless a lower rate is adopted or retained for a particular industry by substantially similar administrative procedure (Sec. 8 (e)).

[2] See Sections 6 (a) (4) and 8 (c).

purpose of fixing for each classification the highest minimum wage rate which will not substantially curtail employment in such classification and will not give a competitive advantage to any group in the industry (Sec. 8 (c)). Classifications solely on a regional basis are prohibited, but the industry committee is to consider competitive conditions as affected by transportation, living and production costs, and wages established by collective bargaining and by employers who voluntarily maintain minimum wage standards (*id.*). When the industry committee has arrived at a minimum wage recommendation, it is to file with the Administrator a report containing its recommendation (Sec. 8 (d)).

After the industry committee has filed its report and recommendation with the Administrator, he is required to give interested parties due notice and an opportunity to be heard for or against the recommended minimum wage rate (Sec. 8 (d) and (g)). The Administrator is directed to approve the recommendation of the committee and carry it into effect if he finds that the recommendations are made in accordance with law, that they are supported by the evidence adduced at this hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, that they will carry out the purposes of Section 8 of the Act. The Administrator must

approve or disapprove the recommendation of an industry committee (Sec. 8 (d)). Wage orders are subject to review by the federal courts of appeals (Sec. 10 (a)).

STATEMENT

1. *Proceedings resulting in the wage order.*[1]—On September 13, 1938, the Administrator of the Wage and Hour Division appointed Industry Committee No. 1 for the Textile Industry. The textile industry was defined to include the manufacture of cotton, silk, rayon, and other products. Seven persons representing the public, seven representing employers in the industry, and seven representing employees were appointed to the Committee (R. 57–59).

Pursuant to a request from the Administrator, at the Committee's first meeting on October 11 and 12, 1939, subcommittees were appointed for the purpose of considering precisely where the line should be drawn between the textile and some related industries. Changes were subsequently recommended to the Administrator, and, before the Committee concluded its deliberations, he modified the definition in certain respects not material here (R. 75, 77–78, 265–266, 1736–1739).

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[1] The composition of the Committee, changes in the definition of the industry, and the proceedings before the Committee are considered in detail in the course of the argument.

At a meeting held in December 1938 the Committee heard witnesses and received briefs and memoranda from numerous interested parties (R. 76, 143–150, 152–158). Statistical and economic studies by the Bureau of Labor Statistics and the Economic Section of the Wage and Hour Division had previously been submitted to it (R. 155–156). The Committee then designated another subcommittee to assemble such additional information and hear such testimony as it deemed necessary to enable the Committee to arrive at a wage recommendation, and this subcommittee obtained further economic data and heard additional witnesses (R. 76, 150–151), including representatives of the American Association of Cotton Manufacturers (R. 151); to which petitioner belongs (R. 27, 39–40).

On March 21, 1939, after extended discussion and deliberation, the full Committee, by vote of 13 to 6, adopted a resolution which tentatively set a minimum wage of 32½ cents an hour (amounting to $13 per 40-hour week or $676 per year)[2] as the rate to be recommended to the Administrator (R. 77, 1719). At this meeting motions to establish

[2] During the first year after October 24, 1939, the effective date of the wage order, the maximum number of hours per week was 42 (Sec. 7). A person working full time at 32½ cents per hour would have received $13.65 per week, and if he worked 52 weeks in the year, $709.80 per year. After October 24, 1940, the maximum number of hours per week was 40, and the earnings per week and per year on the same basis would be $13 and $676, respectively.

classifications and differentials were defeated (R. 77, 1717–1721). A subcommittee was appointed to draft a report (R. 1721), and on May 22 and 23, after the Administrator had slightly modified the definition of the industry (*infra,* pp. 37–38), the 32½-cent minimum was reapproved by the same vote as before and the report accepted and signed (R. 1726–1739). The minority at the same time filed two reports opposing the recommendation (R. 160–220).

The majority report (R. 66–126) described the proceedings of the Committee and analyzed the evidence and data upon which the Committee relied in making its recommendation. The Committee gave special consideration to the question of whether the wage fixed would curtail employment in the industry generally and in southern mills in particular, and to the problem of classification (R. 90–125). It concluded that "no reasonably efficient enterprise in the textile industry need fear the result of the modest wage standard recommended for the industry" (R. 110–111), and that the data before it "did not warrant any regional" or other "classification" (R. 125).

On May 27, 1939, the Administrator gave notice in the *Federal Register* and elsewhere[3] of a public hearing on the recommendation made by the Com-

[3] The notice was also issued to the press, and was actually published in trade publications and many newspapers in regions where the industry is located (R. 229).

mittee (R. 221–229). The hearing, which was conducted by the Administrator personally, commenced on June 19, 1939, and was concluded on July 11 (R. 260). More than 135 witnesses were heard, and over 3,300 pages of testimony taken, plus eight volumes of exhibits. Oral arguments were heard by the Administrator on July 25, 1939, and written briefs received until August 22, 1939.[4] (R. 260.)

On September 29, 1939, the Administrator issued his findings (R. 259–344) and Order (R. 344–348) approving and carrying into effect the recommendation of Industry Committee No. 1 for a 32½ cent minimum wage, effective October 24, 1939; this was the same date on which the minimum wage rate for all employees subject to the Act became 30 cents an hour.

2. *The Administrator's Findings.*—The Administrator's opinion occupies 85 pages of the record (R. 259–344). Inasmuch as the points attacked by petitioners are treated in detail in the argument, only a brief summary of the findings will be made here.

(a) *Definition of Industry.*—The industry, broadly defined, includes the manufacture of yarns and fabrics of cotton and competing materials, such as rayon and silk, and of those finished prod-

[4] The complete record before the Administrator is on file with the Clerk of this Court. Only selected portions have been printed.

ucts, such as sheets, towels, and napkins which are normally manufactured in the fabric-weaving mills. The basic considerations in determining which manufacturing processes were to be covered were "competitive interrelationships" (R. 263–270), the convertibility of looms (R. 264),[5] and the operations normally carried on by textile mills (R. 268–269).

(b) *The Industry Committee.*—Although the Administrator was of opinion that the question of the composition of the Industry Committee was not properly before him, he reviewed the evidence on that point and concluded that the appointments had been made with due regard to the geographical regions in which the industry is carried on (R. 270–276). The opinion outlines the proceeding before the Committee and contains an express finding that the Committee considered the factors set forth in Section 8 of the Act and reached its recommendation in accordance with law (R. 276–278).

(c) *Curtailment of Employment.*—The opinion finds that a 32½-cent minimum wage would increase the *average* wage bill for the cotton-textile industry as a whole 4 percent over the 25-cent minimum in effect before October 24, 1939, and 2.1 percent over the 30-cent minimum in effect thereafter, and that the increases in the southern portion of the industry would be 6.25 percent and 2.15 percent over the 25- and 30-cent minima,

[5] Thus, looms may be interchangeably used for cotton and rayon or for rayon and silk production (R. 264).

respectively (R. 279–280). The Administrator found that, since average labor costs do not constitute over 36 percent of total production costs, this would increase production costs, at most, slightly over one-third of the above figures, or less than 1 percent over the 30-cent minimum wage (*ibid.*); he also found that this increase in costs would not result in such a rise in the prices paid by the ultimate consumer for the finished product as to decrease consumer demand for the products of the industry (R. 292–294). He concluded, therefore, that, in the light of these and other considerations, there would be no substantial curtailment of employment in the industry or its southern branch as a result of the minimum wage recommended (R. 278–302).

Particular attention was paid to the effect of the recommended wage on the small mills in the South paying the lowest wages (R. 302–313). The Administrator estimated that the 32½-cent minimum, as contrasted with the statutory 30-cent minimum, would raise manufacturing costs more than an average of 1.94 percent in mills employing only 7 percent of the southern workers, and for these mills the increase would average from 2.77 percent to 3.75 percent [6] (R. 304–307); that curtailment of

[6] The maximum increase for the 93 per cent of the mills whose wages averaged over 30 cents per hour was an average of 1.94 per cent for mills averaging 30–32.5 cents (R. 304–307). The increase for most of the mills in this 93 per cent was much less than that.

employment even in the mills paying the lowest wages would be dependent on total costs and the technological and general efficiency of each mill, and that low wages do not necessarily coincide with a low degree of efficiency (R. 307–309).[1] Insofar as small southern mills generally are concerned, the Administrator found that small mills are not necessarily marginal or the least profitable mills, but that, even accepting the figures submitted by the group of small mills opposing the 32½-cent minimum, the increase in labor costs for such mills would be only 13.5 percent and in total manufacturing costs only 4 percent over the 25-cent minimum (R. 311.) The increase over the 30-cent minimum, it may be noted, would be slightly over one-third of these amounts. Cf. R. 307. The Administrator also found that a modernization program in these mills would displace only a small number of employees (R. 305–313). On the basis of these facts, the Administrator found that there would be no substantial curtailment of employment even in these small mills as a group (R. 313).

(d) *Classification.*—The opinion takes up each of the factors required to be considered in determining whether classifications should be made

[1] Thus, efficient low wage mills might well absorb the wage increase required by the statute. It was not denied that there might be a decrease in employment in inefficient mills paying the lowest wages, but the finding indicates that such mills constitute only a very minor proportion of the industry (R. 303–313).

within the industry. After examining several studies of the cost of living, the Administrator found that living costs in the North exceed those in the South by about 4.6 percent on an average, that costs in cities in the two regions overlap, and that the differences between cities in each region greatly exceed the difference between the two regions as a whole (R. 321–326). Accordingly he concluded that living costs do not vary substantially or uniformly between regions and do not affect competitive conditions in the industry.

With respect to transportation costs, he found that the northern mills had an advantage in shipping to the northeastern states, but that the southern mills had an advantage in shipping to states in the Middle West and South, having a greater population (R. 330–332, 336).[8] He found that many northern finishing mills received unfinished cloth from southern factories and thus themselves bore the disadvantage of freight rates from the South in competing with southern finishing mills (R. 333–335), and that on an average the South had a slight transportation advantage with respect to cotton coming to the mills (R. 328–329). He concluded that even if average freight rates in the South are somewhat higher than in the North (R. 332), on the whole the advantages and disadvan-

[8] Costs were found to be approximately the same to the Pacific coast and to West Virginia, Ohio, Indiana, Illinois, Wisconsin, and Minnesota (R. 332).

tages in transportation costs for the North and the South were approximately in balance, and that any remaining disadvantage would constitute such a small percent of the value of the product as would not appreciably affect competitive conditions (R. 336).

The Administrator found that, after considering the proportion of obsolescent machinery, taxes, efficiency of workers, power and construction costs, and profits, the southern mills were at least in a position of equality with the northern mills in so far as production costs were concerned (R. 337–340), and that even after the establishment of the 32½ cent minimum wage, the average and customary minimum wages in the North would be considerably higher than in the South (R. 340). He also found that neither wage rates in collective labor agreements nor the wages paid by employers maintaining voluntary minimum wage standards required a classification within the industry (R. 341).

The Administrator concluded that the Industry Committee's recommendations "are made in accordance with law, are supported by the evidence adduced at the hearing and, taking into consideration the same factors as are required to be considered by the Industry Committee, will carry out the purposes of Section 8 of the Act" (R. 344).

3. *Proceedings in the Court Below.*—On October 20, 1939, pursuant to the provisions of Section 10

of the Act, a petition to review the Order was filed in the Circuit Court of Appeals for the Fifth Circuit by the Opp Cotton Mills (R. 4). Subsequently the Southern Cotton Manufacturers Association and fifteen other operators of small cotton mills in the South obtained leave to intervene as petitioners (R. 37, 50, 54–56). Stays were granted to the petitioners, conditional upon the filing of bonds to insure payment of the minimum wage to employees affected by the Order in case the Order was affirmed (R. 25, 49).

On April 2, 1940, the circuit court of appeals handed down its opinion affirming the Administrator's Order (R. 356–365). The court held that the Act was constitutional (R. 364), that the proceedings before the Industry Committee and the Administrator were proper under the statute and the constitution (R. 359–361), and that the Administrator's findings were supported by substantial evidence (R. 363). A petition for rehearing was denied on May 16, 1940 (R. 380). The conditional stay previously granted was continued pending the final decision of this Court (R. 383–384, 387–388).

SUMMARY OF ARGUMENT

I

Petitioners here and appellee in No. 82 (whose argument petitioners have adopted), though not denying many of the general principles as to the scope of the federal commerce power urged by the

Government, assert the existence of a limiting doctrine which prevents encroachment upon the sphere of state control over purely internal matters. While the Government does not deny that "purely internal" affairs are for the states to regulate, it submits that whether a subject has an impact upon many states or is internal is a practical question to be decided on the basis of facts, not on predilections for local or for central government. The opposing parties in these cases do not deny the facts upon which the Government relies to show the relationship between interstate commerce and the subject regulated; their reliance upon a theoretical standard of distribution of powers is, therefore, beside the point.

The Act contains no invalid delegation. The statute prescribes the factors which the Industry Committee and the Administrator are to take into effect in establishing a minimum wage between 30¢ and 40¢ per hour. This method of defining the scope of administrative action has frequently been held to be adequate, even though the precise weight to be given each factor is not specified. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381; *Mulford* v. *Smith,* 307 U. S. 38; *Hampton & Co.* v. *United States,* 276 U. S. 394.

II

A. The Administrator consulted the Industry Committee as to where to draw the line of demarca-

tion between the textile and other industries and modified his original definition of the textile industry shortly before the Committee made its recommendation. Since petitioners cannot show that they are prejudiced or affected in any way by the change in definition or by the line of demarcation finally adopted, they are not in a position to challenge the order entered on this ground. In any event, nothing in the statute precludes the Administrator from making such changes in the definition of the industry, as long as a final definition is reached before the approval of a wage order. His cooperation with the members of the Committee is in conformity with the purpose and spirit of the statute.

B. The Act requires that in the appointment of the Industry Committee "due regard" be given to the geographical regions in which the industry is carried on. The term "due regard" does not require mathematical exactness in the allocation of members of an Industry Committee; it vests a large amount of discretion in the Administrator. Here the Administrator, acting within the limits of his discretion, appointed members from every important cotton manufacturing State, and gave the South nine members to seven for the East and five for "neutral territory."

C. 1. Under the Act the Industry Committee must investigate but need not hold a formal hearing. Such a hearing is to be held by the Adminis-

trator before he approves a minimum wage order. This system, which is similar to that in effect under many state minimum wage laws, complies with all the requirements of due process. *United States* v. *Illinois Central R. Co.*, 291 U. S. 457.

2. The procedure before the Industry Committee was proper under the statute and the constitution. Although the Committee was not required to hold a hearing, in order to obtain information from all possible sources it invited all associations in the industry to appear before it, permitted anyone to appear, heard a large amount of testimony, and received many briefs and documents from the industry, from the Bureau of Labor Statistics and from the Economic Section of Wage and Hour Division. There is no basis in fact for the charge that the Committee discriminated against the South in the course of its investigation. The record shows that the Committee considered all the factors enumerated in the statute in arriving at its recommendation. Inasmuch as the Committee took eight months to reach a decision, the contention that it acted with unbecoming haste cannot be taken seriously.

D. The procedure before the Administrator was proper under the statute and the constitution. Petitioners' representative was given ample notice of the hearing before the Administrator and opportunity to be heard, the testimony presented on their behalf occupying 290 pages in the printed record.

The Committee's recommendation, which the Administrator could only approve or disapprove, advised parties as to the exact issue under consideration. The Administrator himself presided at the hearing. It was not improper for employees of the Wage and Hour Division (assigned to assist the Committee pursuant to express authority in the statute) to appear and testify on behalf of the Committee, and for the Administrator to rely on their testimony.

III

A. 1. Petitioners argue that the Administrator's findings are unsupported by substantial evidence because much of the evidence supporting them would not be admissible in a court of law. The evidence thus challenged consists of official documents, memoranda summarizing such documents, and the testimony of the persons responsible for the preparation of such memoranda. Such evidence, though hearsay, is the kind on which reasonable minds would rely in determining such questions of economic fact as are in issue here. As long as the evidence has "rational probative force" and is the kind "on which responsible persons are accustomed to rely in serious affairs" (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576), it is sufficient to support an administrative finding irrespective of

whether admissible under the technical rules of evidence.

2. Even if the technical rules of evidence be applied, the evidence supporting these findings is admissible under the hearsay rule for official publications, as subject to judicial notice, and because no objection was made to it.

B. The Administrator's finding that the 32½¢ minimum wage would not substantially curtail employment was supported by evidence showing that, as contrasted with the 30¢ statutory minimum, a 32½¢ wage would increase labor costs 2.1 percent for the nation and 2.15 percent for the South, and manufacturing costs less than 1 percent for both, and that such slight increase in costs would be unlikely to affect retail sales prices or consumers' demand.

Although the question of curtailment of employment is to be considered on an industry-wide basis, the evidence also shows that only mills employing seven percent of the southern workers would have their average manufacturing costs increased over two percent. Inasmuch as not all low wage paying mills are marginal, and since many can be modernized, it does not follow that all of the employees of such mills will lose their jobs. The record also shows that small mills are not necessarily marginal, the profitability of an enterprise being determined by its efficiency and degree of modernization, not by its size, and that, even accepting petitioners'

evidence, manufacturing costs would be increased only two percent for the average small mill.

C. The Administrator's finding that a differential below 32½¢ per hour for the South or for small mills in the South was not required is supported by substantial evidence.

1. Although southern manufacturers have a disadvantage in gross freight rates to the northeast, they have an advantage to most of the remainder of the United States. Even the disadvantage to the northeast is minimized by the large portion of such shipments made to northern finishing plants who themselves bear the burden of freight rates in competition with southern finishers, and by the fact that to a large extent North and South are not competitive. Southern mills have an advantage over the northern mills in transportation costs on incoming raw cotton. Average freight rates on textiles from the South are about 10 percent higher than in the North, but the competitive situation is more accurately considered as a point-to-point problem. In any event this difference in average freight rates would amount to only about 0.3 percent of wholesale values, which is clearly not enough to necessitate a wage differential.

2. Costs of living in southern cities average less than five percent less than in the North. No uniform line can be drawn between the two regions inasmuch as intraregional differences are much greater than differences between North and South.

Some high-cost cities are in the South and some low-cost cities in the North. These figures take into account differences in consumer preferences in the two regions. Petitioners' argument in the main confuses the cost of living with the average amount expended, which is, of course, less wherever wages are lower.

3. Insofar as production costs are concerned, the South has advantages over the North. A larger proportion of obsolescent machinery is found in the North. Power, fuel, and construction costs are lower in the South, as are average labor costs, regardless of the minimum wage. Many witnesses, upon whose testimony the Administrator was entitled to rely, stated that southern labor was no less efficient than northern.

4. The Administrator's finding that neither the rates fixed in collective labor agreements nor the wages paid by employers maintaining voluntary minimum wage standards requires a separate classification for the South below the 32½¢ minimum wage is supported by testimony that minimum wages established in collective bargaining agreements in both North and South are not less than 32½¢ per hour, that textile unions do not recognize differentials between North and South, that only a small proportion of mills in the South pay average wages of less than 32½¢ per hour, and that many voluntarily observe minimum standards ranging from 30¢ to 32½¢.

5. No separate classification for small mills would have been warranted. In view of widespread differences in the quality of machinery, no generalization as to the disadvantages of small mills can be sustained. To give small mills an advantage over larger mills with which they are territorially intermingled would be entirely impracticable.

With the South having an advantage in production costs, at most a small disadvantage in transportation costs, and with living costs in the South only slightly lower, it is clear that any disadvantage the South might have is more than compensated for by the 6.4¢ per hour difference in average labor costs which will remain even after establishment of a 32½¢ minimum wage.

ARGUMENT

I

THE FAIR LABOR STANDARDS ACT IS CONSTITUTIONAL

Petitioners have argued that the Fair Labor Standards Act does not fall within any of the enumerated powers of Congress, that it violates the Fifth and Tenth Amendments, and that it contains an invalid delegation of legislative power. In addition to making their own argument on the constitutional issues, petitioners (Brief, p. 117) have adopted the arguments set forth in the brief for the appellee in *United States* v. *Darby Lumber Co.*, No. 82. The Court is respectfully referred to the

Government's brief in *United States* v. *Darby Lumber Co.*, No. 82, this Term, for the argument in opposition to petitioners' contentions with respect to the commerce clause and the Fifth and Tenth Amendments. In this brief we will briefly answer some of the arguments adopted by petitioners from the appellee's brief in the *Darby* case, and in addition consider separately the question of delegation.

Before taking up these points, however, we wish to point out that the record here, although built up for other purposes, demonstrates the intensity and importance of interstate competition in the textile industry and the effect of substandard labor conditions upon that competition (e. g., R. 519, 582, 686, 728, 751, 776–777, Appendix B, pp. 5–6). The national character of the interstate labor problem in this industry and the inability of individual states to cope with it are manifest.[1] The textile industry, like the lumber industry, thus affords an excellent illustration of the conditions at which the Fair Labor Standards Act was directed.

A. INTERSTATE COMMERCE

1. In its brief in the *Darby* case appellee, while conceding many of the general principles urged by the Government, has argued that all are limited by a pervasive rule which prevents "improper en-

[1] See Hearings before a subcommittee of the House Committee on Labor, 74th Cong., 2d Sess., on H. R. 9072, *To rehabilitate and stabilize labor conditions in the textile industry in the United States.*

croachment upon the appropriate sphere of state control" (Brief, No. 82, p. 36). This rule is declared to limit not only the power of Congress over intrastate transactions which affect interstate commerce but also the power "over commerce among the states" itself (*ibid.*). The determination as to whether an exercise of power belongs within the sphere of exclusive state control is said to depend upon "a proper balancing of local and national factors" (*id.*, p. 45). It is apparently agreed by appellee in No. 82 and petitioners here (*id.*, p. 42) that this test gives the National Government power over " 'that commerce which concerns more states than one,' including 'those internal concerns which affect the states generally,' in contrast to 'the completely internal commerce of a state' " (*Gibbons* v. *Ogden*, 9 Wheat. 1, 194–195).

We do not concede that these principles would establish any limitation upon the power of Congress to regulate interstate commerce itself, as is done in Section 15 (a) (1) of the present Act. But with respect to the question of whether intrastate activities may be regulated, the issue between the Government and the opposing parties may be reduced to the question of whether the subject regulated by the Fair Labor Standards Act "affects the states generally" or is "completely internal."

It is the Government's position that this question must be decided in accordance with *facts*

(whether presumed, or proved, or judicially noticed (*United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153)), and that if *in fact* low wages in interstate industry affect the states generally, they fall within the sphere of federal power. The opposing parties, however, seem to have taken a different approach. Appellee in No. 82 does not deny, and seems inferentially to admit, the truth of the facts set forth in the Government's brief; the position taken appears to be that "facts are" not "determinative" (Brief, No. 82, p. 29). On the contrary, it seems to be contended that the issue is to be decided by determining whether or not the subject should be subject to state or federal control; if the former conclusion is reached, the subject is to be characterized as completely internal to the state, rather than affecting the states generally.

We submit that the commerce clause was designed to deal with a practical problem, and that it was intended to give Congress power over those commercial situations which in fact were shown to be interstate by their impact upon many states. The commerce clause was not designed to incorporate into the Constitution any inflexible political theory as to the advantages of local self-government over particular subjects, nor was it intended to be a blanket authority for the ju ciary to distribute powers between the states and the nation in accordance with their genera! predilection for local or central government. This Court has re-

iterated that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business" (*Swift & Co.* v. *United States*, 196 U. S. 375, 398). Although obviously the determination as to where a line should be drawn is one of degree, this Court has recognized that the dividing line reflects a factual relationship. Indeed, the very formula most frequently employed to distinguish between that which is subject to congressional control and that which is not—"direct" as contrasted with "indirect," and "remote" with "close and substantial" (*Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 466–467)—speaks only of the facts and not of an *a priori* concern with extending the scope of either the national or the state powers.

A rule of constitutional decision which was based upon a balance of desirability as between federal and state powers, or which sought to separate interstate from intrastate commerce according to the "governmental interests" of the states and the nation, would embark the courts into an uncharted sea, where the course of decision would of necessity reflect simply the preferences of the individual judges. The Constitution contemplates no such arbitrary distribution of power.

Here, for example, it would be proper to hold, if the facts should support such a decision, that because low wages in interstate industry do not di-

vert interstate trade in any substantial degree the subject is a local one which Congress may not control; but it is not proper to hold that the subject is local for some reason not grounded in fact and, therefore, that its effect on interstate trade must be regarded as insubstantial and indirect and thus immune from congressional regulation.

In these cases the opposing parties are driven to adopt the theoretical approach because they cannot deny that the facts, as set forth in the Government's brief in No. 82, are of common knowledge.

2. Appellee in No. 82 has also advanced the suggestion that the power of Congress is greater over those articles of commerce as to which state and national policy are the same (Brief, p. 39); the federal power over "local" matters is apparently expanded, when it can be assumed that the states will not object. The purpose of the argument is to distinguish the cases sustaining federal power to protect health and morality through commerce regulations from the cases at bar. If this theory be accepted, the majority of the federal Senate and House of Representatives could pass laws regulating commerce in certain fields only where it could be assumed or shown that a majority in state legislatures would approve of the federal regulation. It is apparent that any such rule would violate accepted constitutional principles, as well as the express provisions of the supremacy clause in Article VI.

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3. Appellee in No. 82 (Brief, pp. 31–33) seeks to distinguish *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334, on the ground that the statute there involved served only to supplement the laws of the states into which prison-made goods were being shipped. But the Constitution does not make the commerce power of Congress in any way dependent on state legislation. An issue in the *Kentucky Whip & Collar* case (p. 352) was whether Congress had abdicated or delegated its commerce power to the states by making the effectiveness of a commerce regulation in part dependent upon the existence of state law.[2] This Court expressly declared that Congress "has not acted on any assumption of a power enlarged by virtue of state action" (299 U. S., at 352). Thus this Court's declaration that the paramount power of Congress could appropriately be used to further state policy did not intimate that the power could not be exercised more broadly, but rather the contrary.

B. DUE PROCESS

Appellee in No. 82 (Brief, pp. 92–95) lays considerable stress on an objection made by Representative Ramspeck of Georgia to the arbitrary character of the bill because of its inflexibility (H.

[2] Similar contentions were made and rejected in *In re Rahrer*, 140 U. S. 545, 560, *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 326; see also *United States* v. *Hill*, 248 U. S. 420.

Rept. 2182, 75th Cong., 3d Sess., pp. 20 *et seq.*). This report dealt with the bill originally sponsored by the House committee and passed by the House. Representative Ramspeck was a member of the conference committee which incorporated in the bill the more flexible industry committee procedure finally adopted (H. Rept. 2738, 75th Cong., 3d Sess., 83 Cong. Rec. 9163–9165, 9256). Since he expressly approved the bill in its final form (83 Cong. Rec. 9265), his prior remarks obviously have no application to the Act as passed.

Appellee in No. 82 (Brief, pp. 96–100) seeks to support the contention that the coverage provisions of the Act are too indefinite by reference to a committee report (H. Rept. 2182, 75th Cong., 3d Sess., pp. 9, 11) which also dealt with an earlier draft of the bill. As it first passed the House, the bill applied to employers in an industry "affecting commerce," and the Secretary of Labor was authorized to determine which industries came within that general phrase. Substitution of the more specific language of the present Act for the broad word "affecting" made this delegation unnecessary, and it was deleted. Thus on this point, too, the legislative history quoted by appellee is inapplicable to the Act as passed.

C. THE FAIR LABOR STANDARDS ACT DOES NOT CONTAIN AN INVALID DELEGATION OF LEGISLATIVE POWER

Petitioners assert that Section 8 of the Fair Labor Standards Act contains an unconstitutional

delegation of legislative power. Even a cursory examination of the section will demonstrate the lack of substance in this contention.

Section 8 provides for the establishment of minimum wages between the basic statutory minima of twenty-five and thirty cents per hour and a maximum of forty cents. Paragraph (a) describes the desired goal as "* * * reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, * * *." The Administrator of the Wage and Hour Division is to appoint (Sec. 5) and convene (Sec. 8) industry committees. Each committee after investigation,[3] is to "recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry." The minimum wage recommended cannot exceed forty cents per hour.[4]

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[3] The nature of the investigation required is considered *infra*, pp. 47–53.

[4] Although Section 8 (b) does not expressly state that the highest minimum wage which can be recommended or established is forty cents, Section 8 (a) declares that its objective is "a universal minimum wage of forty cents an hour," and Section 6 requires employers to pay the rate established "not in excess of forty cents an hour."

Paragraph (c) of Section 8 then provides:

> The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:
>
> (1) competitive conditions as affected by transportation, living, and production costs;
>
> (2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by

representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

The industry committee is to submit its recommendations to the Administrator, and after hearing, he is by order to approve and carry them into effect "if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations" (Sec. 3 (d)). The industry committee and the Administrator are thus both bound by the same standards in recommending and establishing minimum wages.

The above provisions plainly contain adequate and intelligible standards to guide administrative action. Indeed, the standards are far more precise than those which have been approved in other cases.[5]

Petitioners' primary objection is that the statute does not prescribe the weight to be given to each

[5] *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 398; *Currin* v. *Wallace*, 306 U. S. 1; *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533; *United States* v. *Grimaud*, 220 U. S. 506; *Buttfield* v. *Stranahan*, 192 U. S.

of the factors enumerated in Section 8 (c). But statutes containing delegations of the same kind were sustained in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 397–399, *Mulford* v. *Smith*, 307 U. S. 38, 48–49, and *Hampton & Co.* v. *United States*, 276 U. S. 394. In *Mulford* v. *Smith* the grant of authority to the Secretary of Agriculture to allot marketing quotas was upheld because, "The Congress has indicated in detail the considerations which are to be held in view in making these adjustments * * *."[6] The standards set

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470 (purity, quality, and fitness for consumption); *Union Bridge Co.* v. *United States*, 204 U. S. 364 (unreasonable obstruction to navigation); *Mahler* v. *Eby*, 264 U. S. 32 (undesirable resident); *New York Central Securities Corp.* v. *United States*, 287 U. S. 12 (in the public interest); *Radio Comm'n.* v. *Nelson Bros. Co.*, 289 U. S. 266 (public convenience, interest, or necessity); *United States* v. *Chemical Foundation*, 272 U. S. 1 (in the public interest); *Colorado* v. *United States*, 271 U. S. 153, and *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35 (certificates of public convenience and necessity); *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420 (just and reasonable commissions); *Wayman* v. *Southard*, 10 Wheat. 1 (in their discretion deem expedient).

[6] The Agricultural Adjustment Act of 1938 (52 Stat. 31, 47, U. S. C. Supp. V, Tit. 7, Sec. 1313 (b), (c), and (e)) provided that the Secretary should allot tobacco marketing quotas "on the basis of the following: Past marketing of tobacco, making due allowance for drought, flood, hail, other abnormal weather conditions, plant bed, and other diseases; land, labor, and equipment available for the production of tobacco; crop-rotation practices; and the soil and other physical factors affecting the production of tobacco: * * *." The Act did not prescribe the weight to be given the various factors.

forth in the Bituminous Coal Act [7] and the Tariff Act of 1922 [8] also consisted of various factors which the administrative officials were directed to take into consideration without any express direction as to the weight to be given them.

These decisions show that it is proper for Congress to limit the scope of administrative action by enumerating the factors which must be considered in carrying out a defined policy, without assuming the difficult and usually impracticable burden of determining precisely how much weight is to be given each factor in particular cases. As this Court declared in the *Sunshine Anthracite* case (p. 398), standards thus established "far exceed in specificity" the approved criteria of "public interest," [9] of "public convenience and necessity," [10] and of what is "just and reasonable." [11]

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[7] The standards in the Bituminous Coal Act are summarized in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 397.

[8] 42 Stat. 858, 941, Sec. 315 (c). In changing tariff rates so as to correspond with differences in the cost of production in the United States and abroad, the President and the Tariff Commission were directed to "take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items * * *, (2) the differences in the wholesale selling prices * * *, (3) advantages granted * * * by a foreign government * * *; and (4) any other advantages or disadvantages in competition."

[9] *New York Central Securities Corp.* v. *United States*, 287 U. S. 12; *United States* v. *Chemical Foundation*, 272 U. S. 1.

[10] *Colorado* v. *United States*, 271 U. S. 153; *Radio Comm'n.* v. *Nelson Bros. Co.*, 289 U. S. 266.

[11] *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; cf. *Avent* v. *United States*, 266 U. S. 127.

It is also objected that such phrases as "substantially," "competitive advantage," and "other relevant factors" allow broad administrative discretion. These general terms are not "devoid of meaning." *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, at 399. Their significance appears from the context and the stated objectives of Section 8. The fact that they allow room for the application of administrative judgment does not invalidate them. Authority is delegated to administrative officials precisely because of this need for applying their judgment and discretion to the facts of numerous detailed situations as they arise. See *Sunshine Anthracite Coal Co.* v. *Adkins,* at p. 399. The breadth of administrative authority is plainly not as great as in the cases cited above (note 5, *supra,* p. 32).

Here administrative action is limited to a narrowly defined field (between thirty cents and forty cents), in which power is given only "to fill up the details" [12] of the statutory scheme in accordance with "intelligible principles." [13] Such a delegation is clearly valid.

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[12] *Currin* v. *Wallace,* 306 U. S. 1; *Wayman* v. *Southard,* 10 Wheat. 1, 43.

[13] *Hampton & Co.* v. *United States,* 276 U. S. 394.

II

The Procedure Before the Industry Committee and the Administrator Was Proper Under the Statute and the Constitution

Petitioners have raised many objections to the procedure before the Industry Committee and the Administrator. Most of these objections are used to support both the charge that the requirements of the statute have not been followed and the allegation that the procedure violates the constitutional guarantees of due process of law. For the sake of brevity, we will treat the statutory and constitutional arguments together.

In general it may be said that although petitioners pay lip service to the doctrine that administrative action is not to be set aside by the courts unless plainly abitrary and capricious, they attempt to evade the rule by characterizing everything with which they disagree as "arbitrary." In effect petitioners seek to have the Court substitute its judgment for that of the Administrator on practically every question upon which the latter passed. In most instances the mere statement of what transpired will be sufficient to show that the procedure was lawful under both the statute and the Constitution.

A. THE DEFINITION OF THE TEXTILE INDUSTRY

The Administrative Order of September 13, 1938, appointing the Industry Committee, defined

the textile industry exactly as it is defined in the final wage order, with two minor exceptions (R. 58–59). The definition at all times included the manufacture of cotton goods, in which petitioners are engaged, and rayon and silk (R. 5, 38). When the Committee met, the Administrator submitted to it a letter requesting its advice with respect to the inclusion of two groups of products on the periphery of the industry (R. 75, 261). Special subcommittees were appointed to consider these questions (R. 75). The first was concerned with the processing of certain knitted and woven fabrics into finished products. An amendment, providing for the exclusion of knitted fabrics and the inclusion of certain other products, such as blankets, sheets, and towels, was recommended, and this recommendation was embodied in Administrative Order No. 6, approved December 19, 1938 (R. 61–62).

The second question submitted concerned the problem of marking the line between the woolen and textile industries, a problem created by the manufacture of material containing a mixture of wool and cotton or rayon in varying proportions (R. 266). The Administrator on May 22, 1939, after receiving the recommendations of the committees of the Textile and Woolen Industry Committees, amended the definition by Order No. 25 (R. 64).[1]

[1] The subcommittee had earlier suggested to the Administrator that a separate committee for the woolen industry be appointed and that the two committees attempt to agree

This order added to the industry as previously defined the manufacture of mixed products containing not more than a specified proportion of wool.[2] After this order was received, the Industry Committee approved a resolution recommending a minimum wage of 32½¢ per hour for the textile industry as finally defined (R. 77–78).

1. Petitioners object that the change in definition after the appointment of the Committee voided the entire order. But, since they cannot show that they were prejudiced or indeed affected in any way by the change in definition or by the line of demarcation finally adopted, they are not in a position to challenge the order entered on this ground. *Heald* v. *District of Columbia,* 259 U. S. 114, 123; *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495, 513; *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515, 558; *Premier-Pabst Sales Co.* v. *Grosscup,* 298 U. S. 226, 227. This principle, in-

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upon a line of demarcation (R. 75–76, 261). The suggestion was adopted, but the two committees could not agree (R. 77, 266, 1736). On May 22, 1939, each committee submitted its own recommendation to the Administrator, and on the same day the Administrator amended his prior definition by adopting the line of demarcation in the NRA Textile and Woolen Codes, which was substantially the recommendation of the Textile Industry Committee (R. 261, 1736–1739).

[2] The processing of yarns and threads containing less than 45 percent wool if manufactured by the cotton system and of finished woven fabrics containing less than 25 percent wool was included within the textile industry (R. 65).

deed, is incorporated in Section 10 of the Fair Labor Standards Act which empowers a reviewing court to affirm, modify, or set aside an administrative order only "so far as it is applicable to the petitioner." The portion of the original definition which applied to petitioners' plants was never changed, and petitioners have not asserted that the modification of the definition in any way concerned them. Under these circumstances, they are precluded from attacking the order on the ground that the definition was altered.

2. The statute, in any event, does not declare that the final definition of the industry must be made before the committee meets. The only statutory requirement is that the "orders" (by which is clearly meant the final orders of the Administrator) "issued under this section shall define the industries and classifications therein to which they are to apply * * *" (Sec. 8 (f)). This in itself indicates that Congress did not intend that the industry must finally be defined before the Industry Committee met.[3]

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[3] Assuming, however, that, inasmuch as the Administrator must approve or disapprove the recommendation of the Committee, the definition finally promulgated must be substantially the one intended by the Committee at the time it makes its recommendation, this condition is plainly satisfied here. The Committee's recommendation was not made until after the issuance of the order finally defining the industry. Indeed, the definition itself is set forth in the Committee's recommendation (R. 125–126).

Moreover, we do not have here a case in which the Administrator drastically altered the original definition of the industry. When the Committee first convened, the general scope of the industry to be considered by the Committee was clearly understood. The problem of the border line or mixed product was frankly placed before it, and the final definition differed only in minor respects from that originally suggested. When such difficult problems arise, common sense dictates that the Administrator shall consult the committees which are established for the very purpose of giving him the advice and assistance of persons experienced in the field.

3. Petitioners also object (Br. 28 *et seq.*) to the definition of the industry on the ground that the Administrator improperly took it upon himself to place the woolen manufacturers under a separate Industry Committee, rather than including them with the producers of cotton, silk, and rayon products. The Administrator's findings show that he included cotton, rayon, and silk in one industry because of the competitive interrelationship of the fabrics and the interchangeability of the looms employed in producing them (R. 263–264; National Association of Cotton Manufacturers Ex. No. 2, Appendix B, pp. 64–66). In excluding the woolen industry account was taken of competitive relationships and of "the differing nature of the establishments, labor forces, and wage structures" (R. 265). The statute does not impose upon the Administrator inflexible boundaries to the generic

term "industry"; indeed, the word "industry" is defined for purposes of the Act as meaning "industry, or branch thereof, or group of industries" (Sec. 3 (h)). In determining what operations come within the jurisdiction of an industry committee, he does not usurp the function of the committee to recommend different minimum wages for separate classifications within the industry submitted to it.

We have difficulty in comprehending petitioners' argument (Pet. Brief, pp. 28 *et seq.*) that the Administrator changed the definition of the industry in order to prevent the Industry Committee from establishing classifications. There is no relationship between a separate classification for wool, whether established by the Administrator or by an Industry Committee, and the separate classification for small cotton mills in the South which petitioners are seeking. Petitioners apparently assail the definition finally promulgated both (a) because the Administrator consulted the Industry Committee before separating wool from other fibers, instead of making the division unassisted, and (b) because he did not permit an Industry Committee to make the separation itself.

B. THE COMPOSITION OF THE INDUSTRY COMMITTEE

The Act (Sec. 5 (b)) provides that in the selection of an industry committee: (1) there shall be an equal number of persons representing the public, the employers, and the employees; and (2) in the appointment of each group "due regard" shall be

given to the geographical regions in which the industry is carried on. The first provision is definite and requires no exercise of discretion on the part of the Administrator except in determining the size of the committee. There is no contention made by petitioners that there was not compliance with this provision. It is the Administrator's action under the second provision, which obviously entails the exercise of discretion and judgment, that petitioners seek to have the Court review.

Petitioners' primary contention is that the Southern states were not given sufficient representation on the committee. The facts in this connection are as follows:

The distribution of the textile industry as defined in the wage order is shown by the following table (R. 274, 401–402):

Geographical region	Number of establishments	Value of product	Number of wage earners
	Percent	*Percent*	*Percent*
South	31	51.5	55
North	69	48.5	45

The Industry Committee consisted of seven persons from each of the three groups represented (R. 271–273).[4] Of the employer representatives five were cotton goods manufacturers, and four of

[4] The original members of the Committee were: *For the Public:* Donald Nelson, Chairman, Chicago, Ill., Grace Abbott, Grand Island, Nebr., P. O. Davis, Auburn, Ala., E. L. Foshee, Sherman, Texas, Louis Kirstein, Boston, Mass., George Fort Milton, Chattanooga, Tenn., George W. Taylor, Philadelphia, Pa.; *For the Employees:* Paul Chris-

these were from southern states (R. 272).[5] The rayon and silk manufacturers each had one representative; since these branches of the industry are predominantly northern, these representatives were selected from the North (R. 274, 402). Two of the representatives of labor were from the South, three from the North and two from Washington, D. C.; all five of the non-southern labor members of the Committee were executive officials of or connected with labor organizations national in scope which represented employees in the South as well as elsewhere (R. 272–273).[6] While the seven public members cannot be regarded as exclusively representing the regions in which the industry is located, three of them came from the South, one

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topher, Charlotte, N. C., Francis P. Fenton, Washington, D. C., Sidney Hillman, New York, N. Y., R. R. Lawrence, Atlanta, Ga., Elizabeth Nord, Manchester, Conn., Emil Rieve, Philadelphia, Pa., H. A. Schrader, Washington, D. C.; *For the Employers:* G. Edward Buxton, Providence, R. I., Charles A. Cannon, Kannapolis, N. C., Robert Chapman, Spartanburg, S. C., John R. Cheatham, Griffin, Ga., John Nickerson, New York, N. Y., Seabury Stanton, New Bedford, Mass., R. R. West, Danville, Va. (R. 271–273).

[5] In the cotton-goods-manufacturing business, 73 percent of the total number of wage earners, 59 percent of the number of establishments, and 70 percent of the value of the product were located in the southern states (R. 273, 402).

[6] That these labor organizations actually represented workers in the South is shown by the number of southern trade-union officers called by these organizations as witnesses at the Administrator's hearing (R. 727, 735, 743, 748, 771, 806). It may be noted that, by definition, it would be difficult or impossible to have representatives of unorganized labor.

from Pennsylvania, and three from the Middle West (R. 271–274).[7]

We think it apparent that in the selection of each group and of the Committee as a whole "due regard" was given to the place of the South in the industry. Petitioners' argument is not that the Administrator gave no consideration to the South but that since the South had a mathematical preponderance in the industry, the Administrator was by law compelled to appoint a majority of each group from that region. In fact nine members of the Committee came from the South and only seven from the states of northern competitors. The two labor members living in Washington, D. C., and the three public members from the middle west fall within neither category. As the court below declared (R. 358):

> * * * The provisions of the Act requiring the Administrator to give "due regard" to geographical regions in the appointment of committee members did not require him to apportion membership on the committee with mathematical precision. It was the duty of the Administrator to exercise sound discretion in this regard and we do not find that he abused that discretion. * * *

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[7] This was the composition of the Committee when it made its recommendation. On January 4, 1939, there were two changes in membership, because of resignations. The only change in regional representation resulted from replacement of Mr. Louis E. Kirstein, of Boston, as a public member by Mr. Fred Lazarus, Jr., of Columbus, Ohio (R. 63).

If mathematical precision in apportionment of committee members had been required, Congress would certainly have so provided in language more definite than the expression "due regard."[8] That phrase does not suggest any exact measure, but by its terms contemplates "a certain flexibility of application." See *Ralston Steel Car Co.* v. *Commissioner of Internal Rev.*, 53 F. (2d) 948, 950 (C. C. A. 6th, 1931); *United States* v. *Interstate Commerce Comm.*, 88 F. (2d) 780, 782–783 (App. D. C., 1937); cf. *Travelers Ins. Co.* v. *Cadena*, 91 S. W. (2d) 1112, at 1116 (Civ. C. A. Texas, 1936).

Petitioners have amplified their argument as to the inadequate representation of the South generally by asserting that (1) small mills in the South, (2) the cotton mills whose wage bills would be most increased, (3) non-union employees,[9] and (4) the "deep South", were given insufficient representation on the Committee.[10] Since the Act demands only that the Administrator give "due regard" to

[8] Compare the definite language used in providing for equal representation for each of the three groups on the industry committees.

[9] It is quite doubtful whether petitioners have any interest in and are in a position to challenge the choice of employee members. See *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 558, where the Court said that the employer "can complain only of the infringement of its own constitutional immunity, not that of its employees."

[10] Petitioners also attack the Administrator for consulting with officials of the Cotton Textile Institute before appointing the Industry Committee. Although petitioners now brand the Institute as the "spokesman for the Eastern interests"

"geographical regions," he was not required under the law to allocate his appointments in accordance with the size of the establishment, the number of wage earners receiving low wages, or the collective bargaining unit to which they belonged. Indeed, the suggestion that the membership of the Committee should be allocated so as chiefly to represent those whose wage bills would be increased the most would, if applied generally, enable the factories paying the lowest wages to determine whether there should be any increase above the basic statutory minimum, a result obviously not contemplated by Congress. The Act was intended to protect not only those receiving the lowest wages, but also those employers and employees who compete with them.

Inasmuch as Virginia, North Carolina, South Carolina, Georgia, Alabama, Tennessee, and Texas were represented on the Committee (R. 271–273), the charge that any geographical section of the South was not given representation has no foundation. Mississippi, the largest southern cotton manufacturing state not represented by one of its own citizens, had only twelve cotton mills with 2,607

(Br. 22, 85), the record shows (R. 849–858, 1084, 1088) that it represented both northern and southern mills (R. 849) and appeared before the Administrator as the representative of the entire industry, including the American Cotton Manufacturers Association, an organization of southern employers (R. 827), to which petitioners belong (R. 27, 39, 50). Petitioners' general attitude toward the Industry Committee appears from their characterization of the minority of the Committee as "the non-partisan members" (Br. 34).

employees (R. 1935), less than one percent of the total (R. 1770–1771, see Census of Mfrs., 1937, pp. 286–287, Appendix B, p. 75). A committee of 300 persons would have been necessary if all groups of that size were to be directly represented.

The rule that courts will not substitute their judgment for that of administrative officials in the absence of a plain abuse of discretion is clearly applicable to the instant case. It has long been recognized that this doctrine has peculiar force, indeed it must have, when applied to such a discretionary matter as the making of appointments to office. *Cf. Marbury* v. *Madison,* 1 Cranch 137, 169–171; *Kendall* v. *United States,* 12 Peters 524, 611, 613; *State* v. *Kuhns,* 27 Del. 416, 89 Atl. 1; *State* v. *McEachern,* 231 Ala. 609, 166 So. 36. It cannot be said here that the Administrator abused his discretion in making the particular apportionment adopted.

C. THE PROCEDURE BEFORE THE INDUSTRY COMMITTEE

1. *The Committee is not required to hold a hearing.* Petitioners contend that in various respects the procedure before the Industry Committee was improper under the statute and the constitution. The premise upon which most of this argument rests is that the Committee failed to hold a formal hearing, with notice, witnesses, cross examination and the other incidents of adversary litigation.

The argument manifests a basic misconception of the statutory scheme. The Industry Committee is

to consist in the main of persons familiar from their own experience with the problems to be considered. The Committee is to "investigate"; it "*may* hear such witnesses and receive such evidence as may be necessary or appropriate to enable" it to carry out its functions (Sec. 8 (b)). It then files a report and makes a recommendation (Sec. 8 (b), (d)). The statute then provides that "upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order" approve the recommendation, "if he finds," *inter alia,* that the recommendations "are supported by the evidence adduced at the hearing * * *." Thus the statute uses the vocabulary of formal procedure—notice, hearing, and findings—when it refers to the action of the Administrator but not when it speaks of the proceedings before the Committee. The latter is directed only to investigate; it may receive evidence, if necessary, but is not required to do so.

The legislative history of the Act shows that the dichotomy was deliberate. The Industry Committee provisions of the Act were drafted by the Conference Committee. The Conference Committee report (H. Rept. No. 2738, 75th Cong., 3d Sess., p. 31) summarizes Section 8(d) as providing that:

> * * * an industry committee, after investigating conditions in the industry, is to make a report to the administrator contain-

> ing its recommendations regarding the minimum wage rates to be established for the industry. Upon the filing of the report, the administrator holds a hearing after giving due notice to interested persons. * * *

Senator Thomas, the chairman of the Senate committee which reported the Fair Labor Standards Bill, stated in explanation of the conference report (83 Cong. Rec. 9164):

> This procedure is modeled upon the New York minimum wage act. In the *Tipaldo* case (298 U. S. 587, 619), Chief Justice Hughes referred to "its provisions for careful and deliberate procedure."[11] It should

[11] The procedure under the New York statute (Laws of 1933, c. 584) is outlined in the dissenting opinion of the Chief Justice in *Morehead v. Tipaldo*, 298 U. S. 587, 619–621. The industry wage board conducts an investigation and makes a report. The state industrial commissioner may after hearing approve the report and issue a "directory order." If after a period of months it appears that there has been persistent non-observance, another public hearing may be held and the order made mandatory. There is no provision for a hearing before the wage board but only before the commissioner. The law was amended in 1937, but this procedure was not changed. (N. Y. Laws of 1937, c. 276, N. Y. Labor Law, Art. 19, §§ 556–560.) Many other states have enacted similar statutes. Arizona (1937 Sess. Laws, 2d Sp. Sess., ch. 20, § 5 (3)); California (Deering's Labor Code, § 1181 [enacted 1937, based on 1913 enactment]); Colorado Stat. Anno. (1935), c. 97, § 244 [enacted 1917]; Connecticut Gen. Stat. (1939 Supp.), c. 131a, § 842e [enacted 1933]; District of Columbia Code (Supp. V, 1939), Title 19, ch. 19, §§ 220, 221 [enacted 1918]; Illinois (Jones Illinois Stat. Anno., § 45.019 [enacted 1933]); Kentucky

be noted that this careful and deliberate procedure has a twofold advantage. On the one hand, it insures that no minimum rate shall be established by administrative action that has not been carefully *worked out* by a committee principally drawn from the industry itself. On the other hand, it insures that no minimum wage rate shall be put into effect by administrative action which has not been found to be in accordance with law by an independent, responsible administrative officer of the Government, *exercising an independent judgment on the evidence after a legal hearing.* [Italics supplied.]

Moreover, in one of the earlier drafts of the bill (Conference Committee draft of June 10, 1938, Section 9), the committee was required to take

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(Carroll's Ky. Stat. (Baldwin's 1939 Supp.), § 4767a [1938] (effective May 31, 1938)); Louisiana (General Stat. (Dart, 1939), § 4357.16 [enacted July 6, 1938]); Massachusetts Anno. Laws, c. 151, §§ 6, 7, 8 [1937, based on statute of 1912]; Minnesota (Mason's Minnesota Stat. (1927) and (Supp. 1940), § 4220) [1913]; New Hampshire (Laws, 1933 ch. 87, §§ 6, 7, 8); New Jersey (Revised Stat. (1937), Tit. 34, § 34:11–45 [1933]); North Dakota (Comp. Laws (1925 Supp.), § 396b6 [1919]); Ohio (Page's Ohio Gen. Code, § 154–45h [1933]); Oklahoma Stat. Anno., Tit. 40, § 269 [1937]; Oregon Code Anno. (1930) and (Supp. 1935), § 49–306 [1913]; Pennsylvania (Purdon's Pennsylvania Stat. Anno., Tit. 43, § 331f [1937]); Rhode Island Gen. Laws (1938), ch. 289, § 7 [1936]; Utah Revised Stat. (Supp. 1939), § 42–2A–4 [1933]; Washington (Remington's Revised Stat. Anno., § 7629 [1913]); Wisconsin Stat. (1939), § 104.06 [1937].

testimony after notice to interested parties. But in the final drafts and in the Act as finally adopted this requirement was eliminated and the present provision merely requiring the committee to investigate was substituted.

The differentiation between the two types of proceedings was an essential part of the scheme of having a committee "principally drawn from the industry" work out the minimum wage. The members of the Committee were to be laymen, temporarily appointed either because of their connection with the industry involved or, as in the case of the public members, because they might have some special viewpoint or information bearing on the industry or the public interest. The Committee members do not sit in a quasi-judicial capacity, or as regular governmental administrative officials. They are not, and are not required to be, trained in judicial or administrative processes. Their particular knowledge of conditions in the trade is the important contribution they have to offer. Their purpose is to supply information, judgment, and viewpoints gained from their experience in or with the trade. This purpose could be served merely by committee members meeting, conferring, and exchanging information and ideas. If further information were needed, the examination of written studies and informal discussion with persons familiar with the problems woud satisfy the demand of

the statute that the Committee "investigate conditions in the industry." [12]

In arriving at a conclusion, the Committee members were entitled to use "their own judgment and their own knowledge * * * which they had a right to use, if honest, however inarticulate the premises." *Chicago B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 596, 598. As this Court declared in that case with respect to a state board of equalization (p. 598), their judgments "express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth. The Board was created for the purpose of using its judgment and its knowledge."

Petitioners argue that the absence of a separate formal hearing before the Industry Committee violates the constitutional guarantee of "fair play" as embodied in the due process clause. But the concept of "fair play" does not require a hearing similar to that held in a court of law as a prerequisite to all the acts of administrative bodies.

[12] As will appear, the Committee did permit interested persons to testify orally before it and to file written briefs. But it also obtained information from studies specially made for it, and from a great deal of published material. Witnesses were not sworn, and the testimony took the form of statements by the witnesses and questions by members of the Committee. Documentary material was distributed to members of the Committee, not treated as if offered in evidence.

In the ordinary affairs of life persons make fair decisions without holding hearings and listening to witnesses and cross-examination, and there is no reason to assume that anything done by an official body is unfair if such a formalized procedure is not employed. Moreover, as this Court said in *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 318, in connection with another agency possessed of investigatory and advisory functions:

> * * * the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditionary forms of hearing appropriate to the one body are unknown to the other.[13]

The hearing which the Administrator holds before any minimum wage order becomes effective satisfies all constitutional requirements. The due process clause does not require a hearing at any particular point, or at more than one point, in a proceeding, so long as a hearing is held before the final order becomes operative. *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463; *Amer-*

[13] The Tariff Act of 1922 (c. 356, Sec. 315, 42 Stat. 858, 943) provided that the Tariff Commission should give "notice of its hearings" and an opportunity "to be heard." Since the Fair Labor Standards Act does not in terms require the Industry Committees to hold any hearings, the *Nitrogen* case applies *a fortiori* to the case at bar.

ican Surety Co. v. *Baldwin,* 287 U. S. 156, 168; *York* v. *Texas,* 137 U. S. 15.

2. *Notice.*—Petitioners have asserted that the Committee did not give adequate notice of its proceedings. Since no formal hearing was held, no formal notice was given or required. The record shows, however, that about 130 representative persons and organizations were invited to appear (R. 130–138) and about 200 persons, representing organizations of large membership, did appear before the Committee or its subcommittees (R. 138–152).

Obviously it would have been impracticable to have invited each individual concern. Nevertheless, it appears that one of the intervenor-petitioners [14] as well as the association to which petitioners belonged [15] was invited to attend (R. 133). Furthermore, petitioners do not suggest that they did not know of the Committee's deliberations or that they requested and were refused an opportunity to appear before the Committee.

3. *Hearing.*—Petitioner also complains that the "hearing" before the Committee was inadequate, particularly as to the views of the small southern cotton mills. As we have shown, the committee was not required to hold any hearing at all. Although it did not hold a hearing in a formal

[14] Robert D. Sanders, president-treasurer of the Aponaug Manufacturing Co., Jackson, Mississippi (R. 133).

[15] Most of the petitioners belonged to the American Cotton Manufacturers' Association, Charlotte, North Carolina (R. 27, 39, 50).

sense, it made a thorough investigation. It took some 1,000 pages of testimony and received a number of voluminous briefs filed by interested parties and also exhaustive studies by the Bureau of Labor Statistics and the Economic Section of the Wage and Hour Division.[16] Of the 39 persons who testified orally before the Committee on the minimum wage recommendation, 23 represented employers (R. 138–152). Of these, 17 represented cotton manufacturers, of whom 9 were from the South and several from small southern mills.[17] In view of these facts, petitioners' assertion that the South, and particularly the small mill group of the South, "was not heard from directly or indirectly" (Br. 48), is wholly without foundation.[18]

Inasmuch as petitioner has not seen fit to include the testimony before the Committee in the printed

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[16] Section 5 (c) of the Act provides that "the Administrator shall furnish the Committee with adequate legal, stenographic, clerical, and other assistance * * *." Section 5 (d) provides: "The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations."

[17] The list of witnesses before the Industry Committee (R. 138–152) includes several persons who subsequently appeared before the Administrator on behalf of the small southern mills (R. 929, 953, 1021).

[18] Of course, the "Committee Representing Small Southern Textile Mills" was not invited; it was not formed until just prior to the Administrator's hearing (R. 13).

portion of the record,[19] the question of whether the Committee's report is properly supported could not be reviewed by this Court even if the Committee were required to hold a formal hearing.[20] Under such circumstances it is doubly unnecessary to review the data upon which the Committee relied.[21]

The evidence before the Committee is summarized, with references to the source material, in the report of the majority (R. 66–126). We respectfully refer the Court to that report as itself the best evidence that the Committee gave the most careful consideration to every aspect of the problem before it, with particular emphasis on the factors listed in the Act. The most cursory study of the report refutes the charge that the majority of the Committee acted in any arbitrary or unfair fashion.

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[19] One copy of the original transcript in typewritten or mimeographed form has been filed with the Clerk.

[20] The Court cannot determine whether an administrative order is supported by evidence unless the evidence is before it. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 443; *Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 253 U. S. 117, 125; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286; *Edward Hines Trustees* v. *United States*, 263 U. S. 143, 148. Although the "evidence" before the Committee is in the record on file with the Clerk, the failure to include it in the printed record would seem to constitute abandonment of the contention that the report must be and is not supported by evidence. *Railroad Comm.* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 392, 398, 401.

[21] The record before the Administrator, which covers substantially the same ground, is summarized on the points in issue, *infra*, pp. 75–110.

4. *Consideration of the issues.*—The Committee's report (R. 66–126) completely answers the argument (Br. 54), if it be open here,[22] that the Committee did not consider the factors enumerated in the statute.[23] The report of the majority shows,

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[22] The question of whether an advisory committee which need not hold hearings or make findings "considered" particular factors in arriving at a recommendation is not readily subject to review either by the Administrator or the courts. Although the statute provides that the Administrator must make findings that he has considered the factors set forth in the Act (Sec. 8 (d)), the Industry Committee is subject to no such jurisdictional requirement. The Committee need only "file with the Administrator a report containing its recommendations" (Sec. 8 (d))—not a formal opinion giving the reasons for its action.

The Committee's duty is to investigate, advise and recommend. The Administrator, who ordains, must consider the same factors. The failure of the statute to require the Committee to hold hearings or make findings indicates that Congress contemplated that persons affected by the wage orders would be adequately protected if the Administrator were compelled to demonstrate, in a record properly reviewable, that *he* had considered the factors listed in the statute.

It was quite plainly not anticipated or desired that anything but the final decision of the Administrator would have to run the gauntlet of judicial scrutiny. Many cases indicate that preliminary or advisory steps of administrative agencies need not be subject to judicial review. *United States* v. *Los Angeles and Salt Lake R. Co.*, 273 U. S. 299; *United States* v. *Atlanta B. & C. R. Co.*, 282 U. S. 522; *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401.

[23] This is shown in concise form by the Index to the report (R., Vol. I, pp. III–IV). Whether or not the Committee considered the factors in question would have to be determined from its formal record—the report, recommendations

in particular, that the Committee was deeply concerned with the consequences of its recommendation on various groups of mills, including the southern mills paying the lowest wages (R. 101–110, Appendix B, p. 8).[24] The substance of petitioners' contention is not that the Committee failed to consider, but that after consideration, an unpalatable result was reached.

5. *Undue haste.*—The allegation is repeatedly made that the Committee acted precipitately, or with "unbecoming haste" (Br. 45–46, 54, 58). But the Committee's recommendation was not finally made until approximately eight months after it had been appointed.[25] Altogether one year and sixteen days intervened between the appointment of the Committee and the Administrator's final order.

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and journal. *Railroad Comm.* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 391; *Chicago B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 593; *Fayerweather* v. *Ritch*, 195 U. S. 276, 306. See also, Note 20, *supra*, p. 56.

[24] There was testimony that the Industry Committee spent 80 percent of its time considering the problem of the small or marginal mill (Appendix B, p. 8).

[25] The Committee was appointed on September 13, 1938, and its recommendation made May 23, 1939 (R. 57, 126). The Administrator's final order was issued on September 29, 1939 (R. 344).

Stress is laid upon the "hope" expressed by the Administrator at a meeting of the Committee on March 21 that some wage recommendation might be adopted at that meeting (Br. 45–46; R. 1716). The meeting in question was held six months after the Committee was originally convened and after all the evidence and material referred to above had been submitted to it. The expression of such a hope cannot be regarded as uncalled for under the circumstances.

This would not appear to constitute undue haste. Due process does not require that either judicial or administrative proceedings be interminable.

6. *Two new members.*—Petitioners suggest (Br. 48, 54) that two new members, appointed on January 4, 1939, in place of persons who had resigned from the Committee, were incompetent to vote on the minimum wage because they had not heard the "evidence." But it does not appear that they did not read the transcript of testimony previously taken or the economic material assembled, or receive a summary from the Committee staff or other members during the two months between their appointment and their preliminary agreement upon a minimum wage to be recommended. Indeed, some witnesses were heard in March, after the new members were appointed. Finally, subtraction of their votes from the total favoring the recommendation would still have left a majority of the Committee in favor of it.[26]

[26] Petitioners twice assert (Br. 41, 48) that a majority of only one of the three groups on the Committee—the employee group—sanctioned the final report. Although this is immaterial since a majority of the total membership of the Committee voted for the recommendation made, the allegation gives a false impression of the stand of the public members. Three out of the five who voted favored the recommendation (R. 1719, 1732). One, Miss Abbott, was ill and did not vote (R. 1716, 1735). Mr. Nelson, as chairman, did not vote, since his vote was not needed, but he signed the majority report and must be deemed to have joined in it (R. 126). Thus four out of six public members favored the recommendation made.

7. *Drafting of the report.*—It is also asserted that the report of the Committee was drafted by members of the Wage and Hour Division. It is probable that the Committee was assisted by members of the Division, although there is nothing in the record to indicate this. But even if it be assumed to be the fact, this would not have been improper. As has been pointed out, paragraphs (c) and (d) of Section 5 provide that the Administrator shall furnish the Committee with personnel and data, and it would have been as proper for the Committee to use the staff thus provided in drafting the report, after it had agreed upon the recommendation, as for any other Government agency to make use of its assistants. None, we think, has before advanced a standard of propriety so sensitive as to preclude an administrative body from using expert assistance.[27]

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[27] We do not believe that there would be anything improper in placing the same assistants at the service of the Administrator during and subsequent to the hearings held on the Industry Committee recommendations. The functions of the Committee and the Administrator are investigatory, not adversary or prosecuting, and we do not see that either reason or the implications of *Morgan* v. *United States*, 298 U. S. 468, 304 U. S. 1, require such an unwieldy disposition of manpower. In point of fact, however, the employees who assisted the Administrator were quite different from those who assisted the Industry Committee (although each group, of course, was ultimately responsible to the same officials). The general procedure is discussed in The Report of the Attorney General's Committee on Administrative Procedure on *Administration of the Fair Labor Standards Act of 1938*, Vol. I, pp. 30–32, 89–98.

D. THE PROCEDURE BEFORE THE ADMINISTRATOR WAS PROPER UNDER THE STATUTE AND THE CONSTITUTION

The statute requires that the Administrator shall, "after due notice to interested persons, and giving them an opportunity to be heard," approve or disapprove the recommendation of the Industry Committee.

1. Petitioners complain that they were given insufficient time to prepare for the hearing. But they were given notice 40 days in advance of the day their representative was heard and introduced extensive evidence into the record.[28] Plainly no more could be required.

2. Petitioners also rely at considerable length on the *Morgan* cases (*Morgan* v. *United States*, 298

[28] On May 27, 1939, a notice that the Administrator's hearing was to begin on June 19 was published (R. 221–229). Petitioners do not claim that they were not aware of this notice. On June 1 an attorney for the Committee Representing Small Cotton Textile Mills asked the Administrator to accord his clients additional time beyond the date of June 19, inasmuch as "several weeks would be necessary to prepare and submit the evidence." The Administrator agreed to give this Committee additional time if it was not prepared by June 19 or June 26 (R. 13, 1563–1564). On June 22 the attorney for the Committee was notified that it would be heard in Atlanta on July 6 and 7 (R. 14). Although he objected that this did not give the Committee sufficient time, the Committee did proceed on those days, offering twelve witnesses whose testimony covers 290 pages in the printed record (R. 1157–1158, 1387–1675). An opportunity was also afforded, if the time given in Atlanta was not adequate, for the Committee subsequently to present further testimony in Washington (R. 1564).

U. S. 468, 304 U. S. 1), although without being very explicit as to how those decisions are applicable. The defects which the Court found in the proceeding involved in the *Morgan* cases are plainly not present here. Inasmuch as the Administrator could only accept or reject the Committee's recommendation, the interested parties were definitely and fully advised of the proposed final order before the Administrator's hearing began. Nor was the change in the definition of the industry near the close of the Industry Committee proceeding prejudicial to a fair hearing before the Administrator, since the definition was established with complete certainty prior to the time the latter hearing was held and, in fact, was incorporated in the notice of hearing (R. 221, 222–223). The Administrator himself heard the testimony relating to the proposals at a three-week hearing, and he himself made the decision.

3. Petitioners also argue (Br. 56) that the Administrator's hearing was unfair because the Industry Committee appeared through counsel and offered evidence in support of its recommendation.[29] Clearly it does not follow, because the Committee is an impartial body, that it should have no interest

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[29] It does not appear that any objection was taken at the hearing to the appearance of counsel for the Committee. This objection is, therefore, not available to petitioners in this proceeding (Sec. 10 (a)).

in bringing forward the facts it has found supporting its own conclusions.[30]

Petitioners also object (Br. 55) that some of the witnesses before the Administrator were members of the staff of the Wage and Hour Division. The requirements of due process do not prohibit an administrative officer from relying upon testimony given by one of his employees. See *Denver Union Stock Yards Co.* v. *United States,* 304 U. S. 470, 477. Indeed, it is common practice for members of the staffs of administrative agencies to present testimony in cases to be decided by the agencies themselves.[31]

It is further implied (Br. 55–56), without any support in the record, that the Administrator's findings were drafted by employees who had aided the Committee and had given testimony at the hearing in support of the recommendation. It is by no means clear that this would be improper. But if we, too, are to go outside the record, we wish emphatically to state that no one assigned to assist

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[30] The representatives of the Industry Committee were in fact employees of the Wage and Hour Division, assigned to the staff of the Committee pursuant to Section 5 (c). In view of this assignment they did not represent the Administrator or take any part in formulating his decision. See p. 61, *supra.*

[31] Members of the staffs of the Federal Communications Commission, the Department of Agriculture, the Securities and Exchange Commission, and the National Labor Relations Board, *inter alia,* present testimony and take an active part in proceedings held before those bodies.

the Committee, and no one who testified at the hearing before the Administrator, participated in any way in the consideration and drafting of the Administrator's decision.[32]

4. The contention that the Administrator's exclusion of certain evidence was erroneous (Br. 56–57) does not raise any issue under the statute or Constitution. The claim is that the Administrator erred in refusing to issue a subpoena for the records of labor unions with respect to membership and contracts. This was regarded as relevant only to the issue of the composition of the Industry Committee.[33] In view of the reasonable objections of other parties, and the failure of petitioners' representative to accept an alternative offer which would

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[32] See p. 61, *supra*. The division of functions between members of the Administrator's staff, pursuant to which those who take part in the proceedings assisting the Committee do not participate in the Administrator's function of passing upon the Committee's recommendation, is described in detail in the Report of the Attorney General's Committee on Administrative Procedure, *Administration of the Fair Labor Standards Act of 1938*, Vol. I, pp. 51–70, 89–98. The report points out that the proceedings are essentially investigatory rather than adversary and suggests that the rigorous division of functions may have been carried too far.

[33] The Administrator did not deny that the provisions of contracts showing the wage differentials as between the North and South were relevant under the Act and subject to a proper subpœna; he declared that the request submitted was too sweeping in scope, but that he would grant a properly limited subpœna calling for that information (R. 823–825).

have brought out all that was relevant,[34] the denial of the subpoena was clearly not prejudicial.

III

The Administrator's Findings Are Supported By Substantial Evidence

A. The evidence upon which the Administrator relied was entitled to consideration

Petitioners contend that the Administrator's findings that the 32½-cent minimum wage will not substantially curtail employment and that classifications are not required are not supported by substantial evidence. The evidence which supports these findings is reviewed at some length, *infra*, pp. 75–110.

The general tenor of petitioners' argument is not that the record contains *no* evidence supporting the Administrator's findings, but rather that such

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[34] Counsel for the Textile Workers' Union of America objected to disclosure of this information in the form demanded in the subpœna, but offered to produce witnesses who could testify as to the total number of union members and the terms of union contracts, statistically compiled so as to show the numbers and provisions for the North and the South (R. 707). Apparently this offer was not accepted. The Administrator held that since this offer in substance would have furnished the information sought to be obtained by subpœna, and since the records requested were of a confidential nature and disclosure might cause unwarranted injury and might be subject to abuse, he would exercise his discretion and not require the production of the documents (R. 821 *et seq.*).

evidence should be ignored because not competent in a court of law (see Br. 109). In particular, this contention is that the Administrator is not entitled to rely on facts set forth in documents prepared, and in some instances published officially, by government agencies, such as the Bureau of Labor Statistics, the Interstate Commerce Commission, and the Economics Section of the Wage and Hour Division. The primary object of attack (Pet. brief, p. 61) is Bulletin No. 663 of the Bureau of Labor Statistics, entitled *Wages in Cotton Goods Manufacturing* (Ind. Comm. Ex. No. 1, R. 1751–1918), and the general problem may well be considered in connection with that document.

Bulletin No. 663, a printed pamphlet of 154 pages,[1] is a study both of general economic conditions in the cotton textile industry, and in particular of the wages paid employees. It is based on data in the files and in previous publications of the Bureau of Labor Statistics and also on economic material obtained from other Government agencies. It is the twentieth detailed survey of textile wages made by the Bureau since 1909 (R. 391). The material was assembled in the same manner as that used in other Bureau of Labor Statistics publications, largely through the voluntary cooperation of employers in the industry.[2]

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[1] The publication may be obtained from the Superintendent of Documents.

[2] The survey was based on pay roll data obtained from a field survey in April 1937 of a carefully selected sample

This study was made in 1938 for the use of the Administrator of the Wage and Hour Division (R. 1763). Its purpose, as an examination of the Bulletin will show, was to present all of the statistical material available, not to support any particular recommendation. The Bulletin was formally introduced in evidence, with an explanation as to how it was prepared, by the Commissioner of Labor Statistics, Mr. Isador Lubin, and by the Chief of the Division of Wage and Hour Statistics, Mr. Jacob Perlman (R. 393–397).[3]

1. Petitioners assert that everything in this Bulletin is hearsay, and that accordingly the Ad-

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of plants employing 20 percent of the employees in the industry. The results of the study were brought down to August 1938 by a mail questionnaire addressed to the same plants. The representative character of this data was confirmed by reports received in August 1938 covering 95 percent of the employees in the cotton textile industry. The Bureau also receives monthly reports from approximately 80 percent of this industry (R. 392, 394–397, 1763–1764, 1831, 1844, 1913–1914).

[3] It was testified that the study was prepared under the direction of Mr. A. F. Hinrichs, Chief Economist of the Bureau, assisted by Mr. N. A. Tolles (R. 392, 398, 1763), that Mr. Hinrichs made the economic analysis and that Mr. Perlman was in charge of the collection of the data and the compilation of the tables (R. 392–393). Although Mr. Hinrichs, who was absent attending a meeting of the International Labor Organization in Geneva, Switzerland, as an adviser to the United States delegation (R. 393), was unable to testify, Mr. Perlman and Mr. Tolles appeared on the witness stand. The Administrator relied on the Bulletin namely for the statistics prepared under Mr. Perlman. See p. 71, *infra*.

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ministrator improperly relied on it in making findings. But it is well settled that administrative agencies are not bound to adhere to "technical rules as to the admissibility of proof," and are not to "be hampered in making inquiry * * * by those narrow rules which prevail in trials at common law * * *." *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 44; *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 93; *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 288; *Spiller* v. *Atchison, T. & S. F. Ry. Co.,* 253 U. S. 117, 131; *Montrose Oil Refining Co.* v. *St. Louis-San Francisco R. Co.,* 25 F. (2d) 750, 755 (C. C. A. 5th), certiorari denied, 277 U. S. 598; *John Bene & Sons* v. *Federal Trade Commission,* 299 Fed. 468, 471 (C. C. A. 2nd); and cases cited, *infra,* p. 70.[4] As early as 1908, the Interstate Commerce Commission observed in its Annual Report (p. 10):

> It is, perhaps, not too much to say that not a single case arising before the Commission could be properly decided if the complain-

[4] Although some of the cases arose under statutes which, like the National Labor Relations Act, specifically provide that "the rules of evidence prevailing in courts of law or equity shall not be controlling" (Sec. 10 (b)), the earlier cases (cited in the text) arising under the Interstate Commerce Act were not based on any such statutory provision. Thus, the rule embodies a general principle of administrative law.

ant, the railroad, or the Commission were bound by the rules of evidence applying to the introduction of testimony in courts.

It has been suggested, however, that although administrative decisions are not to be set aside because incompetent evidence is permitted in the record, the requirement of "substantial" evidence to support administrative findings can only be satisfied by evidence competent in a court of law. Under this view the admission of evidence not strictly competent is not to be regarded as prejudicial, but such evidence cannot be given any probative effect by the reviewing court. Acceptance of any such doctrine would flatly contravene the very reason for establishing administrative agencies. The technical rules of evidence were established to guide inexperienced jurors in adversary litigation. Such safeguards would be both unnecessary and catastrophically cumbersome when the trier of facts is a specialist familiar with the subject and when the issue involved is to a large extent one of economic prophecy in a complex field rather than of simple questions of controverted fact.[5]

[5] See Wigmore, *Evidence*, Sec. 4b; Swancara, *Exclusionary Rules of Evidence in Administrative Hearings* (1939) 11 Rocky Mt. L. Rev. 77; Wigmore, *Administrative Boards and Commissions: Are the Jury-Trial Rules of Evidence in Force for their Inquiries?* (1922) 17 Ill. L. Rev. 263; Riedl, *Should Rules of Evidence Govern Fact-Finding Boards?* (1938) 23 Marquette L. Rev. 13; Pillsbury, *Administrative*

Although the courts have quite properly refused to regard hearsay in the nature of rumor as "substantial" evidence,[6] they have not so devitalized the principle that the rules of evidence do not apply as to hold that substantial evidence means only that which is competent under the orthodox rules. Evidence is substantial if "a reasonable mind might accept [it] as adequate to support a conclusion,"[7] if it has "rational probative force,"[8] or if the evidence, though hearsay, is the kind "on which responsible persons are accustomed to rely in serious affairs."[9]

Tribunals (1923) 36 Harv. L. Rev. 583; 585–588; Stephan, *The Extent to which Fact-Finding Boards Should be Bound by Rules of Evidence* (1938) 24 A. B. A. J. 630; Seymour. *The Professor Soliloquizes on Fact-Finding Boards and the Rules of Evidence* (1938) 24 A. B. A. J. 891; Stephens, *Administrative Tribunals and the Rules of Evidence* (1933). The American Law Institute has now under consideration the problem of the applicability of the rules of evidence to administrative hearings. See *Code of Evidence* (Tentative Draft No. 1, April 18, 1940), Rule 2, comment, lines 29–34.

[6] See *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229–230; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 873 (C. C. A. 2nd), certiorari denied, 304 U. S. 576.

[7] *Consolidated Edison Co.* v. *National Labor Relations Board, supra; National Labor Relations Board* v. *Columbian Enameling Co.*, 306 U. S. 292, 300; see also *International Association of Machinists, etc.* v. *National Labor Relations Board*, 110 F. (2d) 29, 35 (App. D. C.), affirmed Nov. 12, 1940, No. 16, this Term.

[8] *Consolidated Edison Co.* v. *National Labor Relations Board, supra.*

[9] *National Labor Relations Board* v. *Remington Rand, Inc., supra.*

Bulletin No. 663 was used primarily for the detailed statistical information it contained with respect to the hourly earnings of various groups of employees and the average wages paid by employers in the cotton textile industry. From these figures could be computed the effect of any particular minimum wage upon the costs of employers. Petitioners contend that such evidence is incompetent hearsay, since the individual employers who originally reported the data to the Bureau of Labor Statistics were not witnesses. The only evidence entitled to consideration on this point, it is claimed, was the oral testimony of petitioners and a few other operators [10] to the effect of minimum wage rates on a small number of individual mills. But obviously when the fact to be determined is whether there will be substantial curtailment of employment in an industry, the evidence must be industry-wide. The ordinary reasonable mind obviously would obtain its knowledge as to conditions in the industry through a reliable and trustworthy statistical study, not by calling all, or any large number of, mill owners to the witness stand. The latter course would prolong any hearing indefinitely and would produce results far less reliable.[11]

[10] The testimony of petitioners' statistician, Mrs. Mager (R. 1467–1561), based on her analysis of official figures and on returns to a questionnaire, was at least as incompetent as that to which petitioners object.

[11] The necessity for and the trustworthiness of such documentary material would also warrant its admissibility under an exception to the hearsay rule. Wigmore, *Evidence* (3d ed.), Secs. 1420–1422.

This Court has rejected such an impracticable doctrine. In *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 312, it stated that:

> * * * Data collected by the Commission as a part of its function of investigation, constitute ordinarily evidence sufficient to support an order, if the data are duly made part of the record in the case in which the order is entered. * * *

In the *New England Divisions Case*, 261 U. S. 184, 197, the Court upheld the use by the Interstate Commerce Commission of typical evidence as to rate divisions in lieu of evidence as to each rate involved, saying:

> Obviously, Congress intended that a method should be pursued by which the task, which is imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed six hundred; the number of rates involved, many millions. * * * To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. * * *

It is abundantly plain that an industry-wide study of the textile industry must be conducted upon a statistical basis. The only restriction suggested by the cases or by reason is that the data be made a part of the record, or otherwise called

to the attention of the parties, so that they may have an opportunity to meet the data and rebut the conclusions.

2. Bulletin No. 663, and the related economic documents, were, therefore, admissible in the hearing before the Administrator. But, even if the technical rules of evidence were applicable, Bulletin No. 663 would still have been admissible.

In the first place, no objection to its admission as evidence was made, either when it was introduced in evidence (R. 391), or at any other time. As this Court declared in *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 130, in upholding the use before the Interstate Commerce Commission of hearsay evidence obtained during the course of an investigation, "Even in a court of law, if evidence of this kind is admitted without objection, it is to be considered, and accorded its natural probative effect, as if it were in law admissible. *Diaz* v. *United States*, 223 U. S. 442, 450; *Rowland* v. *St. Louis & San Francisco R. R. Co.*, 244 U. S. 106, 108; *Damon* v. *Carrol*, 163 Massachusetts, 404, 408." This rule is doubly applicable here, in view of the provision in Section 10 (a) of the Act that:

> No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure to do so.

Secondly, the Bulletin was admissible under the exception to the hearsay rule for official publica-

tions.[12] In *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 312, the Court declared with respect to the admissibility of "data collected by the [Interstate Commerce] Commission as a part of its function of investigation" that (3 Wigmore on Evidence, 2d ed., §§ 1671–1674):

> * * * Inquests and inquisitions, if they were expressly authorized, are, at common law, admissible in evidence in judicial proceedings, thus constituting an exception to both the hearsay rule and the rule against opinion evidence.

Inasmuch as the Bureau of Labor Statistics, which published Bulletin No. 663, is authorized by Congress to publish bulletins "as to the condition of labor" and "especially" to diffuse information as to "the earnings of laboring men and women,"[13] this principle is applicable here.[14]

Finally, official publications of the Bureau of Labor Statistics have been judicially noticed even

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[12] For the manner in which the Bulletin was introduced in evidence, see p. 67, *supra*. No point has been made that the Bulletin introduced was not a duly authenticated copy.

[13] 25 Stat. 182, 37 Stat. 737, U. S. C., Tit. 29, Secs. 1–6. Legislative authority granted in "general" terms is sufficient to bring an official document within the above exception to the hearsay rule. Wigmore, *Evidence* (2d ed.), Sec. 1670.

[14] Wigmore, in Section 1671, cites the census as an example of an admissible "inquisition of population, manufactures," etc. The wage surveys of the Bureau of Labor Statistics, which are based upon returns from individual employers in the industry, are made in substantially the same manner as the census, and should be just as admissible in evidence.

when not introduced into the record;[15] *a fortiori*, they are entitled to consideration as evidence when they are formally offered.

B. THE FINDING THAT THERE WOULD BE NO SUBSTANTIAL CURTAILMENT OF EMPLOYMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE

1. *The industry as a whole, and its southern branch.* The Administrator found that the establishment of the 32½¢ minimum wage would raise manufacturing costs to so slight an extent as not substantially to curtail employment in the industry as a whole, its southern branch, or even in the group of small southern mills to which petitioners claim to belong. The finding was that, as contrasted with the 30¢ wage made mandatory by the statute on the date the Administrator's wage order became effective, the 32½¢ wage would increase manufacturing costs less than 1 percent for the industry and its southern branch, and less than 2

[15] *West* v. *Chesapeake & Potomac Tel. Co.*, 295 U. S. 662, 673; *McCart* v. *Indianapolis Water Co.*, 89 F. (2d) 522, 526, 302 U. S. 419, 422, 426; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 554; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267; cf. *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607; *Arizona* v. *California*, 283 U. S. 423, 453; *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, 402; *Greeson* v. *Imperial Irr. Dist.*, 59 F. (2d) 529, 531 (C. C. A. 9th); *Atlantic Transport Co.* v. *Rosenberg Bros. & Co.*, 34 F. (2d) 843, 845 (C. C. A. 9th); *City Bank Farmers' Trust Co.* v. *United States*, 5 F. Supp. 871, 873 (S. D. N. Y.).

percent on the average for mills employing 93 percent of the workers in the South (R. 280, 304–307).[16] See pp. 9–11, *supra*.

Except for the figures for small southern mills, which are taken from the testimony of petitioner's own witness (see pp. 86–87, *infra*),[17] the data upon which these calculations are predicated are found in Bulletin No. 663 (Industry Committee Ex. 1, R. 1831–1918). The Bulletin does not in itself contain the computation of percentages of increases in wage bills, but it does show the distribution of hourly earnings among employees in the industry. The manner in which the increase in labor costs resulting from the minimum wage established was computed from those figures is described in Industry Committee Ex. 4, a memorandum entitled "The Possible Effect of Different Minima * * * in the Cotton Textile Industry on Labor Costs, Manufacturing Costs and Prices" (R. 409; Appendix B, pp. 9–21.[18] Mr. Tolles, in testifying orally to the

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[16] The Administrator also found that, accepting petitioners' testimony, manufacturing costs would be increased only 4 percent by the 32½¢ minimum wage, as compared with the 25¢ minimum, for small southern mills (R. 311). Not more than 2 percent of this increase can be attributed to the difference between the 32½¢ minimum and the 30¢ minimum which would otherwise have been in effect (Cf. R. 304).

[17] Mrs. Mager (R. 1492–1494, 1558–1560) appeared as a witness for the Committee Representing Small Southern Mills which represented petitioners' interest before the Administrator (R. 1497).

[18] This memorandum was offered in evidence during the

results of the computations, stated that the 32½¢ minimum would increase labor costs 2.1 percent for the nation as a whole and 2.15 percent for the South over that which would result from the statutory 30¢ minimum (R. 411, 470; see also 506, 661–662, 666).[19]

Mr. Tolles estimated, upon the basis of Federal Trade Commission studies, adjusted in the manner set forth in Ind. Comm. Ex. 4 (Appendix B, pp. 21–26), that labor costs averaged 36 percent of manufacturing costs (R. 414; Cf. R. 1797–1798). Petitioners' own testimony indicated that the proportion of labor costs to total manufacturing costs was considerably less—23 to 29 percent (R. 1471–1473, 1558–1599).[20] Using the 36 percent figure, the increase in manufacturing costs resulting from a 2.15 percent raise in labor costs amounts to 0.77 percent.

Testimony would probably not have been necessary to support the normal inference that so slight a cost increase, whether absorbed or passed on to

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testimony of Mr. Tolles, under whose direction it had been prepared (R. 409). Ind. Comm. Ex. No. 4 is not found in the printed record, but, as permitted by stipulation (R. ix), is printed in Appendix B, pp. 9–42. Petitioners have not challenged the accuracy of the computations.

[19] As compared to the 25¢ minimum, the increase was 4 percent for the nation as a whole and 6.25 percent for the South (R. 470). The increase in manufacturing costs was 1.44 percent and 2.25 percent, respectively (R. 414–415).

[20] Other estimates as to the ratio were 22½ percent (R. 555) and 32 percent (R. 1662).

the consumer, would not substantially curtail employment, by decreasing consumer demand or otherwise (cf. R. 576–578, 587–588; Appendix B, p. 8; Ind. Com. Ex. 4, Appendix B, pp. 26–42).[21] It was shown that the retail price structure was not responsive to small changes in the price of the fabric (R. 415–425, 506–507; Ind. Com. Ex. 4, Appendix B, pp. 37–42), and that even considerably larger increases in the cost of production would be unlikely to affect retail sales prices and consumer demand (R. 577–578, 587–588, 667; Ind. Com. Ex. 4, Appendix B, pp. 33–42).[22] Furthermore, it ap-

[21] A member of the minority of the industry committee admitted that, in view of the greater significance of other factors, in the long run the minimum wage would have no substantial effect upon eventual employment in the textile industry (R. 1100).

[22] The cost of raw cotton constitutes about 50 percent of manufacturing costs (R. 586, 1471–1473). Mr. Russell T. Fisher, president of the National Association of Cotton Manufacturers, testified that (R. 545–546):

"* * * the proposed change in labor cost is not nearly as important a factor in price as the change in raw cotton costs which constantly occurrs. In an ordinary year, the swing in cotton price may be 8 or 10 times as great as the proposed increase in cost due to raising the minimum labor wage from 25 cents to 32½ cents per hour. This is vividly illustrated by Exhibit No. 12, which shows monthly cotton prices from August 1936 to date, and reveals a fluctuation in the price of cotton from 7.71 cents to 15.25 cents, or almost 100 percent.

Certainly an industry that can continue in the face of such fluctuations in the price of its raw material will not be seriously disrupted by the proposed change in its labor minimum."

peared that labor costs had been increased over 70 percent under the National Recovery Act textile code without curtailing employment or dislocating any substantial group in the industry (R. 545, 561–565, 586, 663, 666, 733, 739, 1091, 1097, 1104–1105, 1836).

The evidence which we have outlined not only supports but compels the finding that the minimum wage recommended by the Industry Committee would not substantially curtail employment in the industry or in its southern branch. Petitioners do not challenge the accuracy of any of the computations upon which the Administrator relied. The only objection made to these findings is that they are based on material contained in Bulletin No. 663, and that the Bulletin is hearsay (Br. p. 61 *et seq.*). We have already shown that the Administrator was entitled to rely upon this evidence (*supra*, pp. 66–75).

2. *Small mills in the South.* Petitioners do not seriously attack the Administrator's findings insofar as they relate to curtailment of employment in the industry as a whole or the South generally. They contend, however, that the record shows that employment will be curtailed in a group of small mills in the South, and that this constitutes the "substantial curtailment" forbidden by the statute (Br. p. 66, *et seq.*)

The Administrator stated that in his opinion the question of substantial curtailment of employment

was to be considered on an "industry basis," not in connection with individual mills (R. 309). He nevertheless examined the evidence on which petitioners relied and found that there would be no substantial curtailment of employment even in the small southern cotton mills as a group (R. 309–313). We submit both that his first conclusion was correct and that his finding is fully supported by the evidence.

(a) The question of curtailment of employment must be considered on an industry-wide basis. Section 8 (b) of the Fair Labor Standards Act provides:

> * * * The committee shall recommend to the Administrator the highest minimum-wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment *in the industry*. [Italics supplied.]

This language in itself shows that the question which the Industry Committee and the Administrator were to consider was whether a minimum wage would substantially curtail employment in the industry viewed as a whole. This interpretation is supported by the Senate Committee Report (No. 884, 75th Cong., 1st Sess., p. 4), which states that "a judgment as to whether opportunity for employment will or will not be curtailed must be made in the light of the general industrial situation." See also 83 Cong. Rec. 9266.

It is, of course, true that, as this Court noted in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 397 "in individual cases hardship may result" from a minimum wage law. None can doubt that the fixing of any minimum wage may result in some curtailment of employment by marginal concerns which have remained in business only because of low labor standards—although if total demand for the products of the industry is not reduced, the displacement of employees of such concerns may be made up through the expansion of operations elsewhere (R. 460, 475, 540). The House Committee on Labor (House Report No. 1452, 75th Cong., 1st Sess., p. 8) recognized that:

> * * * a few may suffer some inconvenience, and possibly financial loss, for a short time, but the fact that a tremendous number of injustices will be cured by the bill fully justifies the inconvenience and even the loss. There never has been, and possibly never will be, a law passed the adjustment to which has not caused some inconvenience. * * * To write a bill embodying those principles and, at the same time, cause no inconvenience to any one was, of course, impossible. * * *

In view of these considerations proof that a few individual concerns or even a group of mills would be injured would not show substantial curtailment of employment in an industry. Only if the number of employees harmfully affected was large enough

to constitute a substantial portion of the industry would a substantial curtailment of employment result.

(b) But even if a smaller segment of the industry be accepted as the test the evidence shows that only a minor proportion of the mills in the South would be seriously affected. The evidence shows, and the Administrator found, that the great bulk of the workers (85 percent in the South, R. 305, Ind. Comm. Ex. 6)[23] were employed in mills where the *average* wage exceeded 32½¢ per hour, and that the increase in labor costs in those mills in this group which paid the lowest average wages (32½¢ to 35¢) would be only 3.42 percent over that required by the 30¢ minimum (R. 304–306, 431–433; Ind. Comm. Ex. No. 4, Appendix B, pp. 9–26).[24] Manufacturing costs would be increased only 1.23 percent (*ibid.*). For the employers of 7.6 percent of the workers in mills averaging 30¢–32.5¢ per hour the increase in manufacturing costs over those which would result from the 30¢ minimum would average only 1.94 percent (*ibid.*). Only in mills

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[23] Industry Committee Exhibit 6 (incorrectly referred to as Exhibit 7) is printed in full in the Administrator's findings (R. 305).

[24] The figures discussed in this paragraph appear in or are computed from Bulletin No. 663, Ind. Comm. Ex. No. 1 (R. 1838–1841), and the method of computation is explained in detail in Industry Committee Exhibits No. 4 (Appendix B, pp. 21–26) and No. 6 (R. 305), and was explained orally by Mr. Tolles (R. 429–433).

employing 7 percent of southern workers would the increase be greater; mills averaging 25¢–30¢ per hour would have their manufacturing costs increased an average of 2.77 percent, and mills averaging 20¢–25¢ per hour, 3.75 percent.[25] Only 2.4 percent of the employees were in the group of mills averaging less than 25 cents per hour (Ind. Comm. Ex. 6, R. 305) [26].

Even if we assume the comparatively small number of mills whose manufacturing costs will be increased over 2 percent will be handicapped by the 32½¢ minimum wage, it does not, of course, follow that all the employees of such mills will lose their jobs. Although it is impossible to give exact proportions (R. 460), some of the low-wage mills are undoubtedly efficient and well able to absorb the required increase in labor cost out of profits (R. 433, 434, 778, 1817). Another group of mills pays low wages in order to make up for avoidable inefficiency, such as failure to modernize equipment to the same extent as the remainder of the

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[25] As to these two groups, the increase in labor costs over that required by the 25¢ minimum would be 18.21 percent and 29.79 percent, and over that required by the 30¢ minimum 7.69 percent and 10.42 percent (R. 304; Ind. Comm. Ex. 4, Appendix B, p. 17). Application of the 36 percent ratio gives the estimated increase in manufacturing costs.

[26] 1,211 employees in six mills received an average wage of less than 20¢ per hour (R. 306, 1838).

industry (R. 434, Appendix B, pp. 4. 6[27]). When allowance is made for these factors, even as applied to the mills most seriously affected, it is apparent that the finding that the 32½¢ minimum wage will not cause substantial curtailment of employment in the industry or any substantial portion thereof was entirely justified.

Although it is not essential that the Administrator's prediction as to the effect of a wage order turn out to be correct, if his findings are reasonable and supported by evidence, it is worth noting that the dire consequences prophesied by those opposing the Industry Committee's recommendation do not appear to have come true. Officially published reports showing production and employment in the cotton textile industry monthly by states indicate that the South generally and each southern state individually except Mississippi[28] has consid-

[27] The testimony of a number of mill owners showed that they might survive the wage increase if their machinery were brought up to date or their plants operated more efficiently (R. 564, 951–955, 989, 996), and that the reduction in employment under such circumstances would amount to only a fraction of their total labor force (R. 564, 946, 953, 989, 996, 1007–1009, 1027, 1575; cf. R. 548–549, 1619, 1389, 1571). The testimony indicated that mechanization of such mills was inevitable, apart from the wage increase, if they were to survive (R. 461, 509, 665, 730, 779–780, 954, 1427). The increase in labor costs would only have the effect of hastening the day when new machinery had to be installed (R. 435, 477, 954).

[28] The *Census of Manufactures for 1937*, p. 286–287 shows only 12 textile mills employing less than 1 percent of the

erably increased its total production and employment since October 1939,[29] when the wage order became effective.

(c) The conclusion is not altered if one looks only at the effect of the wage order on small mills. Petitioner's principal argument is that employment in small mills in the South will be substantially curtailed. The premise of the argument is the assumption that small mills are marginal because they have a higher percentage of overhead expense, and that this disadvantage makes them less able to bear an increase in labor costs.

The Administrator found that small mills are *not* necessarily marginal (R. 310). This finding

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workers in the industry in Mississippi (Appendix B, p. 75); see also R. 1588–1589, 1935 (12 mills in 1939)). At least six of these mills were protected against compliance with the 32½¢ minimum wage by the stay granted in this case (R. 25, 37, 24, 49, 383, 387, 1976).

[29] The Bureau of the Census publishes monthly the number of active spindles and the number of spindle hours in the textile industry by states. Bureau of the Census, *Activity in the Cotton Spinning Industry*. Tables made up from the figures thus published appear in Appendix B, pp. 76–77. They show that the southern states as a unit and each individually, with the exception of Mississippi, have considerably increased their activity in the industry since October 1939. The Bureau of Labor Statistics has recently published a tabulation showing indexes of "Employment and Payrolls in Cotton Goods Manufacturing by States, 1937–1940." A table prepared from this tabulation, showing the change between October 1939 and August 1940, set forth in Appendix B, p. 78, confirms the conclusion that employment has not been curtailed in the southern states in relation to the industry as a whole or to the New England States.

is supported (1) by direct statements to that effect by mill owners experienced in the industry, who declared that the profitability of an enterprise was determined by the extent to which its machinery had been modernized, not by its size (R. 557, 560, 571, 876, 895, 909, 911);[30] (2) by a tabulation showing the profits and losses of mills of different sizes (R. 1967), which even petitioners' own witness admitted indicated no discernible relationship between profitability and size of mill (R. 1522–1530); and (3) by figures presented by petitioners' witness which disclosed an absence of correlation between the percentage of overhead costs for large and small manufacturers (R. 1471–1473).[31]

Indeed, if petitioners' testimony be accepted at its face value,[32] it purported to show only that for

[30] Two southern mill operators opposing approval of the wage recommendation stated that they didn't "think size has anything to do with" whether or not a mill was marginal (R. 876, 895).

[31] The testimony of this witness, Mrs. Mager, was that overhead costs for large manufacturers of coarse cotton yarn were 2 percent less than for small manufacturers, but that overhead costs for large manufacturers of cotton sheeting and similar products were 7 percent greater than for small manufacturers (R. 1471–1473).

[32] Mrs. Mager's testimony was based on unsworn returns to a questionnaire sent to 483 "small" southern mills (under 25,000 spindles; cf. R. 1546–1549), which urged them to present "specific examples of hardships caused by the Act" (R. 1536, 1546, 1551, 1970–1973). Only 98 of the mills responded (R. 1492, 1498, 1546), and these were weighted by an excessive proportion of replies from the areas with the

a group of small southern mills the 32½¢ wage would increase manufacturing costs 4 percent over those resulting from the *25¢* statutory minimum (R. 1494, 1558–1560). Since certainly no more than half of this increase (cf. R. 304; Ind. Comm. Ex. 4, Appendix B, p. 17, and p. 77, *supra*) can be attributed to the difference between the 32½¢ minimum and the *30¢* minimum which became effective under the statute on the same day, it is apparent that the 32½¢ minimum wage would not have a sufficient effect upon production costs to curtail employment even in the group of small mills for which this witness spoke.

There was testimony as to the general disadvantages of small enterprises competing with large (R. 1390–1392, 1430, 1441–1442, 1582–1583, 1619). But even if this be assumed to be true, it would not prove that employment in small mills would be substantially curtailed by the establishment of the 32½¢ minimum wage, in view of the fact that a small mill efficiently operated with up-to-date machinery may still have lower total costs per unit than a larger concern (R. 557, 560, 571–572, 876, 895, 909, 914). There was in addition testimony of individual owners, referred to by petitioners, that they would be forced to close down if the In-

lowest wage rates (R. 1540–1543). The returns to this questionnaire cannot be regarded as truly representative of the situation in all small southern mills, or as impartial or unbiased, but only as *ex parte* statements from the mills most desirous of defeating the wage order (R. 1533–1536).

dustry Committee's recommendation was approved [33] (R. 1388, 1402, 1432, 1440–1442, 1573–1574, 1643–1645). Such testimony cannot be taken at its face value.[34] Furthermore, the predictions as to the disastrous effect of the minimum wage were frequently conditioned on the continuance of the low price levels prevailing at the time the testimony was given (R. 933, 1007, 1556, 1573, 1618). As the Administrator found (R. 291), the price level was rising when the hearing was held (R. 1037–1038, 1556); it had risen substantially by the time the Administrator approved the wage order, and has since remained above the level existing at the time of the hearing.[35]

We submit that the Administrator correctly determined that this evidence, with its qualifications,

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[33] Many of these operators admitted that they were losing money even apart from the proposed increase in wages (R. 1388, 1434, 1572–1574, 1643).

[34] For example, a witness representing mills in Texas stated that (R. 1440, Pet. brief, p. 68):

"I will make the definite and positive statement that if the Fair Labor Standards Act is enforced according to the recommendation of the Majority of the Committee, without a differential, and the freight discriminations are not removed, there will not be a cotton mill left operating in Texas at the end of five years."

Census reports show that Texas' production increased in the first year after the minimum wage order became effective (see Appendix B, pp. 76–77).

[35] Cf. R. 291. See Appendix B, p. 79, for a table giving the index numbers of wholesale prices of cotton goods since January 1938. This table was based upon figures published in United States Department of Labor, Bureau of Labor Statistics, *Wholesale Prices*

was outweighed by that upon which he relied. This Court is not, of course, required to weigh the evidence for itself. All it need determine is that the Administrator's findings that employment will not be substantially curtailed are based upon substantial evidence, and that is plainly the case here.

C. THE ADMINISTRATOR'S FINDING THAT CLASSIFICATION WITHIN THE INDUSTRY IS NOT REQUIRED IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Petitioners claim that the establishment of a uniform minimum wage for the entire nation was not in conformity with the standards prescribed in Section 8 (c) of the Act, and that the Administrator's finding to the contrary is not supported by substantial evidence. They urge in this connection that the establishment of a uniform minimum wage will give the North a competitive advantage over the South.

Section 8 (c) of the statute provides, in this connection, that the Industry Committee shall recommend such classifications, as "will not give a competitive advantage to any group in the industry," that "no classification shall be made * * * solely on a regional basis," but that "the industry committee and the Administrator shall consider among other relevant factors the following: (1) competitive conditions as affected by transportation, living, and production costs; (2) the wages established for work of like or comparable character by collective labor agreements negotiated be-

tween employers and employees by representatives of their own choosing; and (3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry."

The findings show that the Administrator gave careful consideration to each of the above factors and determined that there would be no such competitive disadvantage as would require a separate classification for the South (R. 318–344).

Before entering upon a detailed analysis of this evidence, we desire to point out that, as the Industry Committee found (R. 72):

> The minimum wage recommendation of this Committee will not remove the general differentials in wages that exist among the different geographical areas in which the industry is located, although these differentials probably will be narrowed to some extent. * * *

This general proposition was accepted as axiomatic (R. 485–486, 543–544, 549, 588, 685, 870, 1174, 1366–1368). It was estimated that even though a national minimum wage of 32½¢ be established, the average hourly earnings in the North would still be 6.4¢ higher than in the South.[36] Ob-

[36] Before the Act became effective, average hourly earnings in the North were 44.6¢ per hour and the South 36.6¢ (R. 408, 541, 1836). It was estimated, without contradiction, that the effect of the 32½¢ minimum wage would be to raise these figures to 45.3¢ in the North and to 38.9¢ in the South, leaving a difference of 6.4¢. Appendix B, p. 1, R. 1368.

viously the Industry Committee and the Administrator were not required by the Act to establish separate classifications for North and South if the difference in labor costs remaining after the establishment of a minimum wage was more than sufficient to compensate for any competitive disadvantage which the South might suffer as a result of the wage fixed.

1. *Transportation costs.* — The Administrator found that in transportation costs the advantages and disadvantages of northern and southern mills were approximately in balance, that any remaining disadvantages which the South might have would constitute a very small portion of the value of the product, and that accordingly differences in transportation costs do not so affect competitive conditions as to require a separate classification for southern mills (R. 336–342). A brief review of the evidence will demonstrate that this finding was correct.[37]

(a) *Actual freight rates to consuming markets.*—A freight expert representing the southern mills testified that the "principal disadvantage of southern shippers" was not the difference in average rates per mile, but the fact that the northeast-

[37] A comprehensive analysis of the freight rate structure is found in *Cotton, Woolen, and Knitting Factory Products*, 211 I. C. C. 692, incorporated by reference in the record (R. 595) and cited hereinafter merely as 211 I. C. C. The problem of transportation costs is also considered at length in Industry Committee Ex. 9, Appendix B, pp. 43–63.

ern mills were closer in distance to the large consuming markets (R. 1111). This disadvantage was exemplified by the lower freight rates to New York City from New England than from the South (R. 1112). The record shows that freight rates from New England states were lower than those from the South to points north and east of a line running generally through Virginia; West Virginia; Columbus, Ohio; Central Indiana; Chicago; Wisconsin; and Minnesota; but that to points south and west of that line (except to the Pacific coast)[38] rates were lower from the South than from New England (R. 330–332, 635–639, 653; Natl. Assn. of Cotton Mfrs. Ex. 30 (Map) R. 1945). Population statistics show that the territory in which the South has an advantage has the greater population (R. 635–636, Natl. Assn. of Cotton Mfrs. Ex. 29, R. 1943).[39]

Furthermore, generalizations as to freight differentials for large regions such as the "North"

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[38] Water rates from New England and southern ports to the Pacific coast are approximately the same, and much less than rail rates. All-rail rates are lower from the South (R. 1938–1940).

[39] This exhibit, which was limited to states with over 1,000,000 population, shows a population of 38,000,000 in states in which New England mills have a general advantage, 53,000,000 in states in which southern mills have a general advantage, and 22,000,000 in states where no such advantage can be said to exist. The Administrator thought that Illinois and West Virginia should be included in "neutral territory," thus reducing the population of states in which the South has an advantage to 44,000,000.

and "South" give a deceptive impression. Each manufacturing district in a region has advantages in some markets and disadvantages in others, and the difference between competitors in the same region may be greater than that between regions (R. 1103–1104, 1125). Thus, although the small group of 14 Texas mills, for example, may suffer a disadvantage in freight rates in sales to the North and East, it may be able to dispose of a large proportion of its output in Texas and the southwest, where it has an advantage (cf. R. 1452).

(b) *Competition in finished products by northern plants receiving fabrics from the South.*—To a considerable degree the northern and southern mills are not directly competitive, the South producing yarn and coarser and unfinished materials and the North a large proportion of fine and finished fabrics. Competition between them in the main is limited to the sale of those fine or finished fabrics which are manufactured in both areas (R. 1181–1183, R. 561).[40]

[40] The South produces over 90 percent of the yarn manufactured for sale (R. 1874), and over 86 percent of the coarser fabrics, but only about 21 percent of the fine fabrics. (R. 644, 1948–1950.) Only 31 percent of the employees engaged in dyeing and finishing are in the South (R. 1102, 1948–1950.) Only 3.4 percent of the broad woven fabrics made in the South are of fine quality; 5 percent of employees in the southern cotton goods industry are engaged in dyeing and finishing (R. 1490). In New England about 50 percent of the broad woven fabrics manufactured are of fine quality, and 23 percent of the employees are

The northern finishing plants receive most of their unfinished fabrics from the southern mills (R. 644, 647, 1950). To the extent that the northern mills receive fabrics from the South, they themselves must bear the burden of the high freight rates from South to North before they send their finished products into competition with southern manufacturers (R. 643–647, 653; 211 I. C. C. 754–755). Under such circumstances the disadvantage of the South in transportation costs on competitive products to northern cities largely disappears (211 I. C. C. 754–755). The evidence shows, for example, that total freight rates to New York City on materials first processed in the South and finished in New England plants are slightly higher than on goods finished in southern plants (R. 642–646; Natl. Assn. of Cotton Mfrs. Ex. 31, R. 1944–1946).

(c) *Cotton received by the mills.*—New England mills, of course, also obtain their raw material from the South. Freight rates on raw cotton coming into the mills must also be considered in determining whether a particular region is subject to a competitive disadvantage because of transportation costs. The southern mills are nearer to the

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engaged in dyeing and finishing (R. 1490–1491, 1147). Narrower fabrics are made almost entirely in New England and the Middle Atlantic States. Census of Manufactures, 1937, pp. 287, 303; Census of Manufactures, 1935, pp. 264–268 (where 1937 data not comparable); Committee of Small Textile Mills Ex. Nos. 29, 30, Appendix B, pp. 72–74.

cotton fields (R. 406). Except to the extent that the northeast receives cotton from southwestern and Mississippi Valley states by water from Gulf ports at rates less than the rail haul from those states to mills in the southeast (R. 1114, 1130–1131), freight rates on incoming cotton are less in the South than in the North.[41] These facts support the Administrator's finding that (R. 329):

> * * * Weighing together the disadvantage to some Southern mills in purchasing Texas cotton with compensating advantages to these mills in purchasing cotton from other regions, I find that as a whole transportation costs upon raw cotton run in favor of the mills located in cotton growing states.

(d) *Differences in average freight rates.*— Petitioners also complain that south-to-north rates are higher than rates in the North on a per mile basis. The record contains varying estimates of this differential (R. 601, 1115, 1111,

[41] R. 530; National Association of Cotton Manufacturers Ex. No. 5, Appendix B, pp. 67–70. Inasmuch as the largest portion of the cotton crop is grown in the southwestern and Mississippi valley states (R. 1114, 1130–1131), the quantity shipped from these areas to the other southern states is not inconsiderable (R. 971–973, 980, 1130–1131). But much raw cotton is obtained locally (R. 588, 1002; Ind. Comm. Ex. 9, Appendix B, p. 50) and transported less than 200 miles to the mill, under a freight rate of 30¢ or less per hundred pounds (R. 444–445). Indeed, the petitioners in this case have stated that in their operations they obtained their cotton in the states in which they do business (R. 34, 52).

1155).[42] The Interstate Commerce Commission had estimated the average differential in rail rates to be about 10 percent (R. 601, 1111, 211 I. C. C. 786). But this does not take into account lower water transportation rates and special rail rates since established which diminish the South's disadvantage (R. 601, 1115). Such general nation-wide average differences do not accurately reflect the competitive situation. As we have shown, favorable freight rates give the South a competitive advantage over the North in a substantial portion of the country. The freight rate problem must be studied in the light of actual competitive relationships, which are generally point to point and not nation-wide, as the Industry Committee and the Administrator both found (R. 114, 332, 1103–1104, 1125).[43]

(e) *The relationship between transportation costs, total production costs and wage rates.*—Differences in transportation costs would require a

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[42] These estimates ranged from less than 5% to 13% (R. 601, 1111, 1115, 1155). The complicated freight structure is described in 211 I. C. C. 692. This shows that first-class rates in the North are considerably lower than in the South, but that southern textile products are carried under commodity rates at a much lower percentage of the first-class rate than in the North. This greatly reduces the actual difference in the rates (R. 597; 211 I. C. C., at 708, 710–711).

[43] A southern manufacturer and member of the minority of the Industry Committee admitted that in view of the unevenness of the impact of freight rates, it would not be feasible to base a regional differentiation in minimum wages upon differences in freight rates (R. 1103–1104).

separate wage classification only in proportion to their effect upon the total cost of production. It was estimated that freight rates average about 3 percent of the wholesale value of the product (R. 450; see also Ind. Comm. Ex. 9, Appendix B, pp. 47–49).[44] On this basis a 10 percent difference in transportation costs would be equivalent to 0.3 percent of the wholesale value.[45] If all of this difference be allocated to labor costs (36 percent of total production costs; see p. 77, *supra*), the difference in freight rates would equal approximately 1 percent of the wage bill (R. 450). As has been shown, *supra*, p. 90, the difference between average wages in the North and South remaining after the establishment of the 32½¢ minimum wage will be many times greater than that necessary to compensate for any difference in freight rates.[46]

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[44] This estimate was confirmed by the statement of a southern manufacturer that transportation costs were 7½ percent of his wage bill (R. 1417). This would amount to 2½ to 3 percent of total production costs. See p. 77, *supra*.

[45] Even as applied to freight rates into New York City, a most extreme example, where rates are obviously much lower from New England than from the South, the disadvantage of the southern mills amounts only to 1.7 percent of the estimated wholesale value of the finished cloth (R. 446).

[46] Computation of this difference, based on the outside estimate of a 29 percent freight disadvantage for the South submitted by one of petitioners' witnesses (R. 1113, 1139), indicates that at most a difference of 0.8425¢ per hour in average wage rates would be warranted by transportation differentials (R. 1133–1136).

The evidence outlined above clearly is sufficient to support the Administrator's finding that differences in transportation costs are not such as to necessitate different minimum wages. Petitioners attack (Br. pp. 92–93) this testimony mainly on the ground that Mr. Tolles was not a traffic expert (R. 442). We believe that it was entirely proper for the Administrator to give weight to his testimony, inasmuch as it was based upon a study of transportation costs in the textile industry and received in evidence without objection (R. 441–449). But in any event most of the Administrator's findings are based not alone on Mr. Tolles' testimony but also on that of five traffic experts whose qualifications are unchallenged and whose evidence petitioners' brief completely ignores;[47] on evidence submitted by traffic experts testifying in opposition to the minimum wage (R. 1109, 1149); and upon the comprehensive report of the Interstate Commerce Commission.

2. *Costs of living.*—The Administrator found that, "Living costs do not vary substantially between regions and do not affect competitive conditions in the industry between these regions" (R. 326).

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[47] James P. Harrington (R. 594), M. L. Hatch (R. 613), A. F. Ferguson (R. 627), Harold D. Arnold (R. 641), James H. McCann (R. 647). Petitioners rely on the testimony of two other freight experts who opposed the wage recommendation (R. 1109, 1149), but choose to disregard the evidence submitted by those who supported it.

This finding is supported by the testimony of Mr. Tolles (R. 451–456), by an exhibit prepared under his direction, which summarized the facts set forth in published studies of costs of living (Ind. Comm. Ex. 10, R. 1921–1935), and by these studies themselves.[48] Studies by the Bureau of Labor Statistics showed that for thirty-two cities of various sizes living costs averaged 4.6 percent higher in the North than in the South (R. 1924), and that in small cities the difference was 3.1 percent (R. 1954, 1958, see also R. 1346–1347).[49] Costs in the highest and lowest cities in each geographical area varied by as much as 22.9 percent in the North and 12.6 percent in the South (R. 1925), differences much larger than those between regions, and costs in cities in the two regions overlapped (R.

[48] A study by the Bureau of Labor Statistics of living costs in 5 small northern and 5 small southern cities was introduced in evidence and is printed in the record (Natl. Assn. of Cotton Mfrs. Ex. 37, R. 1954–1965). Other publications on this subject were referred to and relied on by various witnesses (R. 528, 774–775, 1303–1304, 1346–1347, 1375–1376, 1480), and are subject to judicial notice. See the studies listed and summarized in the brief for the United States in *United States* v. *F. W. Darby Lumber Co.*, No. 82, p. 112, and those listed at R. 1375.

[49] The study of costs in five small northern and five small southern cities showed that rent was 7.6 percent and fuel 34 percent lower in the South, but that fuel, light, and refrigeration together were only 8 percent lower, that food costs were substantially the same, and that clothing, furnishings, and equipment and miscellaneous items ranged from 2 to 4 percent higher in southern cities (R. 1954–1955, 1958–1960, 1964–1965).

1348, 1923). The highest cost city in the 250,000–500,000 group was in the South, and the lowest cost city of all those investigated in the North (R. 1929).[50]

This testimony is corroborated by that of a statistician appearing in opposition to the 32½¢ minimum wage, who stated that he was "reasonably familiar" with five other studies of relative costs of living (listed at R. 1375), and admitted that, although he disagreed with them, each pointed "to the fact that the differences in cost of living between northern and southern regions are largely mythical" (R. 1375–1376).

Petitioners have argued that the studies relied on by the Administrator fail to take local preferences and conditions into account. But the report of the Bureau of Labor Statistics (R. 1953–1956, 1958–1961) shows on its face that these matters were given consideration. Its conclusion as to foods was based upon the customary purchases of families in each region (R. 1958), in the South more weight being given to corn meal and sweet-potatoes and in the North to white bread and milk (R. 1956). Rents were secured for houses of the same size but not for the same type of construction, in view of the difference in climate (R. 1959). Houses with gas room heaters in the South were treated as the equivalent of houses with furnaces

[50] Atlanta, Georgia, and Hanover, Pennsylvania.

in the North (*ibid.*). The fuels priced were those customarily used in each region (*ibid.*).

Petitioners, asserting that the study prepared by Mr. Tolles (Ind. Comm. Ex. 10) was the only "proof the Administrator had" in support of his finding (Pet. Brief, p. 87), object to the Administrator's finding on the ground that it is based only on hearsay and not admissible in a court of law. In the first place it should be noted that the record also contains the study by the Bureau of Labor Statistics upon which Exhibit 10 was primarily based (Natl. Assn. of Cotton Mfrs. Ex. 37; R. 1954–1965) and refers to various other studies, so that the Administrator's finding would be supported even if Exhibit 10 were eliminated from consideration. We have already demonstrated, furthermore, that such an objection has no merit in a proceeding of this kind (see pp. 66–75, *supra*).[51] Relative costs of living can only be determined by general studies and surveys, and reasonable per-

[51] Here, also, as was the case with Bulletin No. 663, the Administrator's determination would be supported by substantial evidence, even if the rules of evidence were to be strictly applied: (1) the Bureau of Labor Statistics' documents are admissible as official publications; (2) Exhibit 10 was admitted while the person who supervised its preparation was testifying orally; (3) no objection was made to the admission of any of such documents into evidence; and (4) many of the documents are subject to judicial notice. Cf. pp. 66–75, *supra*. Indeed, petitioners sought to avail themselves of similar material (cf. R. 1301–1308, 1480–1481).

sons would rely on such studies without requiring oral testimony from each field inspector or statistical clerk contributing to the final result.

Petitioners rely upon (1) the evidence of individual southern mill officials who, without manifesting any knowledge of what living costs were in the North, stated generally that living costs were much lower in the South (cf. R. 1392–1393, 1434, 1642); (2) testimony of Mrs. Mager as to differences in actual expenditures of workers' families (R. 1484); (3) the testimony of a statistician (Professor Adamson) based upon a study of the nutritious value of foods (R. 1301–1303, 1313–1344);[52] and (4) the difference between National Recovery Administration code wages, Works Progress Administration wages, wages required to be paid under the Walsh-Healey Act, and old age relief payments in the North and South (R. 1234, 1239–1241, 1476–1479). (See Br. pp. 89 *et seq.*)

Since none of this material demonstrates that the Administrator's finding is not supported by the evidence outlined above, we need not consider it in detail. The argument in the main confuses the

[52] This testimony was based upon a Circular (No. 507) of the Bureau of Home Economics of the Department of Agriculture (R. 1301–1302, 1325), which was introduced in evidence but is not included in the printed record. Such a publication is, of course, subject to the same evidentiary objections as petitioners make to the documents relied on by the Administrator. Cross-examination demonstrated that this document did not support petitioners' position (R. 1313–1344).

cost of living with the average amount expended by wage earners' families. Inasmuch as workers in the South generally have lower incomes than in the North, they spend less. But a comparison of living costs must be based upon an equivalent standard of living, upon the cost of equally desirable items from the standpoint of the consumer.[53] The cost of living would not be less in areas where prices for identical commodities were the same merely because a lower income level in one area caused its inhabitants to purchase less or less desirable products.

The Walsh-Healey Act, referred to by petitioners, requires Government contractors to pay the

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[53] R. 452–453. Bureau of Labor Statistics Bulletin, Serial No. R. 963, *Differences in Living Costs in Northern and Southern Cities* (p. 1), Monthly Labor Review, July 1939, states:

"This comparison between expenditures required to purchase a given level of family living in different places has sometimes been confused with an entirely different type of comparison, that between the money expenditures families actually made in different places. Differences between expenditures actually made by families in two different regions are chiefly a reflection of differences in income. It would be clearly improper, therefore, to use differences in expenditures actually made, a result of differences in income, to determine differences in income needed to maintain a given level of living. Such a procedure could result only in the perpetuation of existing differences in wages, without any reference to their ability to support equally satisfactory manners of living. It is clear, therefore, that the comparison must be made of the costs required to purchase the same level of well-being in the regions compared."

prevailing minimum rate of wages in the locality (49 Stat. 2036, U. S. C. Supp. V, Title 41, Sec. 35 (b)). The wages thus fixed do not reflect differences in living costs, but differences in wages previously paid (R. 1249). Similarly the Emergency Relief Appropriation Acts of 1937 and 1938, to which reference was made at the hearing, also required that Works Progress Administration wages "be not less than the prevailing rates of pay * * * in the same locality" (50 Stat. 354, § 2, 52 Stat. 809, § 9) (see R. 1287–1288).[54] The textile code under the National Industrial Recovery Act established a differential for the South in order to allow for housing furnished by southern employers, as appears from the letter of the Administrator transmitting the code to the President for approval (R. 1251–1252)[55]; the Fair Labor Standards Act permits the reasonable cost of such facilities to be included in the minimum wage (§ 3 (m)). And the Social Security Board, in its old age relief payments, simply matches dollar for dollar the amounts paid

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[54] The Act of 1939 (53 Stat. 933, §·15 (a)) provided that after August 31, 1939 (after the completion of the hearing in this case) wages should not be varied in different areas by more than the differences in costs of living, except insofar as necessary to maintain the same national average labor cost. The wages first prescribed under this Act are set forth at R. 17–23.

[55] See National Recovery Administration, *Codes of Fair Competition*, Vol. I, Code No. 1 for the Cotton Textile Industry, Letter of Transmittal, pp. 10–11.

out by the individual states (49 Stat. 621, U. S. C., Title 42, Sec. 303 (a)).[56]

The Act requires that living costs be given consideration in determining whether competitive conditions require classification. But, it may be noted, living costs themselves are hardly a competitive factor in the sense that transportation and production costs are, since an employer does not lose business to competitors merely because the living costs of his employees are lower.

The legislative history of the Act shows that Congress did not intend a difference in living costs *alone* to justify a separate classification. Congressman Ramspeck of Georgia, a member of the Conference Committee which reported out the Fair Labor Standards Bill in the form in which it was finally passed, explained the effect of the living cost factor as follows (83 Cong. Rec. 9266):

> If the only difference within an industry should be found to be a lower cost of living to the employees of an employer in the

[56] The statement in petitioners' brief (p. 79) that "Social Security payments" disclose a difference in treatment between North and South is misleading. The figures referred to by petitioners are amounts paid for old-age assistance, with respect to which the Federal Government matches the State appropriation. Unemployment compensation benefits under Title III and IX of the Social Security Act are also determined by the states. Old-age pensions, under Title II, are uniform throughout the nation. See 49 Stat. 621, 622, 626, 639 (U. S. C., Title 42, secs. 301 *et seq.*, 401 *et seq.*, 501 *et seq.*, 1101 *et seq.*).

> South, then to provide lower wages on that account would give an advantage to his employer over an employer in the North, and that is strictly prohibited by this act, and it ought to be prohibited.

The factors relied on by petitioners are not entitled to as much weight as the studies of living costs upon which the Administrator based his finding. It was, in any event, for him to weigh the evidence, and his conclusion that living costs do not necessitate a separate classification for the South is clearly supported.

3. *Production costs.*—The Administrator found not only that differences in production costs did not warrant a lower wage rate for the South, but that "the South has production cost advantages in some respects and is in at least a position of equality" (R. 339–340). The evidence supporting this finding may be summarized as follows:

(a) An owner of mills in the South [57] testified that obsolescent machinery is found everywhere, in large and small mills, in the North and in the South, and that he believed that a larger percentage of marginal mills would be found in the East than in the South, where the industry was newer (R. 914). Another witness testified that

[57] Charles A. Cannon, a member of the minority of Industry Committee No. 1, who opposed adoption of the minimum wage recommended (R. 211).

"on the whole, textile mills in the South are of more recent construction and contain more modern machinery than those in the North" (Appendix B, p. 4).

(b) Despite the suggestion in petitioners' brief (pp. 99, 102) that "the evidence was all one way" as to the lower efficiency of southern labor, a number of witnesses, including those familiar with the industry in both North and South, testified that there was no difference in the efficiency of the employees in the two sections (R. 530, 534, 580, 780, 977, 1080, 1105, 1182, Appendix B, p. 5). Although there was evidence to the contrary (R. 1067–1068, 1575–1576, 1585–1586, 1649), the Administrator was entitled to believe the statements of the above witnesses.[58]

(c) There was evidence that power, fuel, and construction costs were lower in the South than in

[58] Mills producing finer products, of course, need more highly skilled labor (R. 1182), and to the extent that northern mills as a whole are engaged in producing such goods, it can be said that northern manufacturers use a greater proportion of skilled labor (R. 1163–1164, 1872–1873). This does not prove that northern employees doing the same kind of work are more efficient than southerners. And although it may well be that when the mills in the South were new southern workers were less experienced, the southern textile industry has by now been established for many years—certainly for long enough to break in its workers (R. 1608–1609, 1657–1658). The record shows that petitioners' mills had been in existence from 11 to 39 years (R. 1387, 1401, 1429, 1609, 1627, 1663).

the North (R. 530, 987, 1513–1514; Natl. Assn. of Cotton Mfrs. Ex. 6, Appendix B, p. 71).

(d) It was not disputed that even if the 32½¢ minimum wage were adopted, labor costs in the South would be considerably lower than in the North (see p. 90, *supra*).

(e) An advertisement of the governors of the southeastern states proclaimed that manufacturers locating in such states would have the advantage of "lower production costs" (R. 1966; see also 1202–1209). An officer of a company having mills in both North and South concluded that "after making due allowance for the estimated effect of the proposed minimum wage," there would still be "a decided cost advantage in favor of the Southern mills as against the Northern mills" (R. 588; see also R. 531).

4. *Collective Labor Agreements and Voluntary Wage Standards.*—There was testimony that the minimum wages established in collective bargaining agreements in both North and South are not less than 32.5¢ per hour (R. 660, Appendix B, pp. 2, 3), and that the textile workers' unions do not recognize well-settled differentials between North and South (R. 532, 679–680).

The wage standards actually maintained in the industry are comprehensively described in Bulletin No. 663 (R. 1831–1918). This shows that in only 14.6 percent of the mills in the South and in less

than 1 percent of the northern mills were the average earnings of employees less than 32.5¢ per hour (R. 1838). There was testimony that a number of southern mills had voluntarily observed minimum standards ranging from 30 to 32½¢ per hour (R. 555, 939, 1415).

The Administrator found that neither the rates fixed in collective labor agreements nor the evidence on wages paid by employers maintaining voluntary minimum wage standards requires a separate classification for the South below the 32½¢ minimum wage (R. 341).

5. *Small mills.*—The evidence also shows that no separate classification for small mills would have been warranted. Small mills are certainly in no different position than larger mills insofar as transportation and living costs are concerned. And although in theory it can be argued that a higher percentage of overhead costs for small mills results in greater total production costs, in fact, the record indicates, no such generalization can safely be made. A small mill with modern machinery will have lower production costs than a large mill with older equipment (see p. 86, *supra*). Moreover, to give small mills scattered throughout the same territory as the larger mills an advantage would undoubtedly greatly confuse the competitive structure of the industry. The establishment of

separate classifications for mills of different sizes would have been entirely impracticable.

The substance of petitioners' argument that the South should be separately classified is that a uniform minimum wage would place its mills at a competitive disadvantage. We have shown that in fact the South probably has an advantage over the North in production costs, that it is questionable whether there is any general disadvantage in transportation costs, and that living costs in the South are only slightly lower than in the North. Looked at by themselves these facts would not compel a finding that the establishment of a uniform minimum wage would injure the southern mills. Even if it be assumed that the South might suffer some slight disadvantage, this would be more than compensated for by the 16.7 percent differential in labor costs remaining in favor of the South after the establishment of a 32½¢ minimum wage. Under such circumstances the Administrator properly approved the Industry Committee's recommendation of a uniform minimum wage of 32½¢ per hour without separate classifications for the North and the South.

CONCLUSION

For the above reasons it is respectfully submitted that the judgment of the court below should be affirmed.

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APPENDIX A

Fair Labor Standards Act of 1938, c. 1060, 52 Stat. 1060, 29 U. S. C. Supp. V, Secs. 201 *et seq.*:

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent

in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour)

prescribed in the applicable order of the Administrator issued under section 8.

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

* * * * *

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its

recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the

Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

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